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MINUTES

OF

CASES

ARGUED AND DETERMINED

IN

The High Court of Chancery.

By ROSS DONNELLY, Esq.

OF LINCOLN'S INN, BARRISTER AT LAW.

LONDON:

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MINUTES OF CASES

ARGUED AND DETERMINED

In the High Court of Chancery.

ROLLS' COURT.—Jan. 27, 1836.

Jackson *v.* Jackson.

The following question arose in this case:—A father having a power to appoint a sum of money amongst his children, and in default of appointment to be divided between them, exercised the power when one of the children was on her death-bed. The question was, whether this execution was good? His Lordship thought there could be no doubt but that the execution was bad, as the father would be entitled, on her death, as her representative. Lord Eldon made a similar decision in the *Roxburgh Fen.* ca. reported in 2 Dow. 200.

VICE-CHANCELLOR'S COURT.—Jan. 29, 1836.

Kimberley *v.* Yeo.
Kimberley *v.* Jennings.

The suit on which the demurrer was filed, had been instituted to obtain an injunction, restraining the defendants, Jennings and Yeo, from working or carrying on trade or business of manufacturers, in partnership with certain individuals at Birmingham. Two separate agreements had been entered into between the plaintiffs and the defendants, whereby the defendants agreed to act in the capacity of travellers' clerks and book-keepers to the plaintiffs for six years, for which they were to receive a graduated scale of wages and salary, which the plaintiffs had the power to reduce, in the proportion to the misconduct of either of the defendants; and for gross misconduct, wilful negligence, or in the event of illness, absolutely to discharge them. The defendants covenanted, also, not to work for any other individual, in either of the above-mentioned capacities, during the term of six years, without the license of Kimberley. The agreement with Jennings

further contained a covenant that, at the end of the term, he should become a partner.

In consequence of alleged misconduct, as travellers, the defendants had been employed exclusively as clerks and bookkeepers. In the mean time the defendants entered into engagements with other manufacturers in Birmingham, and one of the defendants was actually in partnership with a person named Groves. The bill was then filed to restrain the defendants as above mentioned, and for general relief.

The VICE-CHANCELLOR said, it did not appear to him to be the meaning of the agreement, that if the defendant Jennings should not continue, during the whole six years, in the service of Kimberley, he should be disabled from entering the service of any other person. He could not but think, looking to the whole of the agreement, the true construction to be, that while Jennings continued, during the six years, in the service of Kimberley, he could not engage himself with any one else; but if it should happen that he should be dismissed from the employment, then he might be able to engage himself to other persons. But the agreement was so constructed, that if Jennings should be prevented by illness, or by any thing else out of his controul, from performing his part of the agreement, he might be discharged, and his stipend discontinued, and during the six years could not be employed by any other person. He considered it a hard bargain on a young man who was drawn in to execute the agreement. It was true that the plaintiffs had offered to perform their part of the agreement, but the Court would not enforce a hard bargain.

As to the proviso in the agreement with Jennings, to take him into partnership after the end of six years, they might impose such conditions on him as to make it impossible for him to compel a performance of the agreement: and the Court will look to the whole of the agreement, and not carry into execution a part only. The Court would no doubt perform a negative contract; but as it cannot enforce the performance of the whole, it will not a part: and the demurrer was allowed.

Counsel.—Sir W. Horn, Mr. Haytor, Mr. Knight, and Mr. Richards.

Cases cited.—*Flint* v. *Brandon*, 8 Ves. 162; *Morris* v. *Colman*, 18 Ves. 437; *Kemble* v. *Keene*, not reported; *Mitchel* v. *Reynolds*, 1 P. W. 185, 191, 192.

EXCHEQUER EQUITY SITTINGS.

GRAY'S INN HALL.—FEB. 19, 1836.

(*Before Lord Abinger.*)

DARTHEZ AND ANOTHER *v.* LEE.

This was a demurrer to a bill of discovery, and to stay proceedings at law. Three only of the plaintiffs to the bill, who were in

partnership, were defendants at law, the other partner, S. Darthez, being out of the jurisdiction of the Court, upon business connected with the partnership. The bill of discovery was filed in the name of all the partners, including S. Darthez.

The question was, whether S. Darthez being a party to the suit was a good ground of demurrer?

His Lordship said he must overrule the demurrer; it was founded upon a mere technical objection, viz. that all the plaintiffs in equity were not all defendants at law. Upon looking at the principle of the cases cited, he found it to be this—that no party could file a bill of discovery, unless he had some interest in the discovery. A stranger who shared no interest whatever in the subject matter, could not file such a bill. This principle was laid down in *Cardall* v. *Watkins*, and no proposition could be more just. The other cases were cited to show, that a party, to be entitled to file a bill of discovery, must have either an action brought against them, or have reasonable ground to expect one.

The general proposition was true, but they had no right to take it as limiting the right to a discovery to persons only who were on the record. The case of *Richardson* v. *Soares*, was very different from the present. That was a case in which Richardson could by no possibility be affected by the judgment; but in the present case, though the judgment could not, in point of form, be entered up against S. Darthez, it would affect his share of the partnership assets. He had a direct interest in the suit.

Counsel.—Mr. G. Richards, Mr. Temple, Mr. Rogers.

Cases cited.—*Cardall* v. *Watkins*, 5 Mad. 18; *Richardson* v. *Soares*, not reported.

(*Before Baron Alderson.*) FEB. 16, 1836.

LONGUET *v.* HOCKLEY.

Moss Levy, being in trade with his brother, Lewis Levy, and his cousin, Walter Levy, he devised and bequeathed his real and personal estate to Hockley, upon trust to convert the same into money, and stand possessed of the proceeds, upon certain trusts, in the will mentioned. Hockley, in breach of the trust, continued the business with the two co-partners, in the name of the testator, and died indebted to the trust estate in the sum of £1,100, and without leaving sufficient personal assets.

Baron ALDERSON held clearly, that Hockley was a trader under Sir S. Romilly's act, by which simple contract debts are made payable out of the real estate of the debtor, and that lands devised are liable for the amount of the debt due to the trust.

Counsel.—Mr. Boteler and Mr. Craig, for plaintiffs; Mr. Treslove, Mr. Williamson, and Mr. Lewin, for different defendants.

Cases cited.—*Wightman* v. *Toroneow*, 1 M. & S.; *Ex parte Garland*, 10 Ves. 110.

ROLLS' COURT.—Feb. 15, 1836.

Campbell *v.* Campbell.

In this case two suits had been instituted in which infants were plaintiffs; a reference was made to the Master to ascertain whether the suits were for their benefit; the Master made his report, which was objected to, and the question was, whether this objection could be made, on the motion to confirm the report, or whether the parties must file exceptions? It was contended that, in the present case, it could be done on the motion.

The Master of the Rolls said this ought to be done by exceptions, otherwise the Court would have to go into both causes, which would not be the case in exceptions, as the points in that case would be brought directly before the Court; and his Lordship granted permission to present a petition for leave to file exceptions.

Counsel.—Mr. Pemberton, Mr. Kindersley, Mr. Temple, and Mr. Richards.

Case cited.—*De Costa* v. *De Costa*, 3 P. W. 140.

Tomlinson *v.* Surnnerton.

This was a motion to expunge a demurrer, or to take the answer and demurrer off the file: the defendant took out a commission to answer, and instead of an answer a demurrer was returned to part and an answer to the remainder; and the question was, whether the proceedings of the Commissioners in so doing was right?

The Master of the Rolls had looked into Wyatt's Practical Register, 333; Gilbert's For. Rom. 93; and Turner and Venables, and was of opinion that the demurrer ought to be expunged, at the same time giving the parties leave to apply for an order to put in an answer.

Feb. 16, 1836.

Wetherell *v.* Wilson.

A feme covert in exercise of a power of appointment, appointed certain sums of stock by her will to trustees in trust for her child or children living at her decease, share and share alike; the sons to take at twenty-one, and the daughters at that age or marriage. There was a clause that the trustees were to pay the income of the children's shares to the husband of the testatrix, their father, for the better enabling him to maintain and support the children till their shares became vested; and, in case of the husband's death, the trustees were to apply the same for the maintenance and support of the children, according to their discretion, and the provision not applied for their maintenance, was to accumulate, and there was an ultimate trust for the husband. The husband executed an assignment to trustees for the benefit of his creditors generally. The question was, whether the creditors were entitled,

under the assignment, to receive the fund to be appropriated to the maintenance of the children, or whether the father was a mere trustee for the children?

The Master of the Rolls said he could see no doubt on the subject, and that this varied from the case in which trustees were directed to apply the maintenance. The father was bound to apply it for the maintenance and support of the children; the money is directed to be paid to the father for particular purposes, and he could not consent that the children should be deserted by their father, and the money which ought to be applied for their benefit should be applied in payment of the creditors of the father.

Counsel.—Mr. Pemberton, Mr. Barber, Mr. Kindersley.

Cases cited.—*Brown* v. *Cassamajor*, 4 Ves. 498; *Benson* v. *Whittan*, 5 Sim. 22; *In re Ashley*, 1 Russ. & Milne, 371; *Hamley* v. *Gilbert*, Jac. 345; *Thurston* v. *Essington*, ib. 361, n.; *Hammond* v. *Nearne*, 1 Swan. 35.

EXCHEQUER.—Feb. 24, 1836.

(*Before Baron Alderson.*)

Knebell *v.* White.

This case involved two points: first, whether the plaintiff could have an account, when the bill did not contain an offer to pay the balance, if the balance should be against him.

His Lordship said it did not seem to him a good objection. Praying for an account was equivalent to an offer to pay any balance that might appear to be due; and, if so, the Court might, upon further directions, decree against the plaintiff to pay such balance. At any rate, as there was an offer at the bar to do this, he could not allow this objection to deprive the plaintiff of his remedy. Even if he did not consider it a valid objection, he would permit the plaintiff to amend his bill.

The second point was, that the bill sought to have an account of the rents and profits of premises in the defendant's possession, which he held under an annuity-deed to secure an annuity. The deed contained a clause of repurchase, but there was no offer in the bill to repurchase on such equitable terms as the Court should think fit.

On the question whether the jurisdiction of the Court ought or ought not to be exercised in favour of a party who did not offer to do complete equity, there were contradictory decisions, viz. the opinion of Sir John Leach at variance with those of Lord Eldon and Sir L. Shadwell. On considering the cases it appeared to his Lordship, that the decisions of the latter judges were right. As in a case of partnership, a party praying for an account must also pray for a dissolution of partnership, it appeared to him, in this case, the plaintiff should have offered to redeem or repurchase

upon equitable terms. On these grounds he was of opinion that the bill must be dismissed with costs.

ROLLS' COURT.—Jan. 27, 1836.

Hughes *v.* Rogers.

The question in this case was, whether a contingent interest in a legacy was forfeited to the crown, the legatee having committed a felony during his nonage by stealing a goose, for which he was convicted, and sentenced to a month's imprisonment? He attained his majority after the term of imprisonment expired. The contingency of his taking was his attaining twenty-one years.

His Lordship said he would look into the books, but his impression was, that it was not forfeited.

Counsel.—Mr. Tinney, Mr. Daniel, Mr. Wray.

Feb. 17, 1836.

Hearsden *v.* Williamson.

This bill was filed for a specific performance of an agreement against a purchaser, who had refused to complete the purchase because there was an uncertainty as to what estate the trustees (who were to convey to the purchaser) took. The case was this:—A testator, by his will, after devising as therein mentioned, devised the rest of his real estates to his wife, for life, or till her marriage, subject to pay £100 yearly till certain mortgage-debts were paid; and from and after her decease or marriage, in case the mortgages should not be paid off, he devised the same estates to trustees and the survivor of them, and the executors, administrators, and assigns of such survivor, upon trust, to let the same for the best rent that could be got, and apply the rents and profits from time to time in payment of the mortgages; and after the death or marriage of the wife he gave the estates to his son, for life, subject as therein mentioned, and after the death of the son to his children living at his decease, their heirs and assigns, to take as tenants in common, and in default of such children upon other trusts therein mentioned. The testator had devised other property to his trustees to sell and apply the proceeds towards payment of the mortgages, and the widow tenant for life was in possession from 1820 to 1830, when she died, and the son had no issue. All the mortgage-debts were paid by the trustees, but not till after the death of the widow, and a part of them were paid out of the rents after her death. The question was, whether the trustees took a fee or a term under the will?

The Master of the Rolls stopped the Counsel, saying, that he had made up his mind. His Lordship said there could be no doubt that the word heir was not absolutely necessary to give the fee. The question was, whether the purposes mentioned in the

will were sufficient to give the trustees the fee. He did not think them sufficient; for, on payment of the debts, the purposes of the will were completed. The estate of the trustees is at an end.

Counsel.—Mr. Pemberton, Mr. Tinney, Mr. Bellamy.

Cases cited.—*Doe* v. *Simpson*, 5 East, 162; *Doe* v. *Timins*, 1 Bar. & Ald. 530; *Horton* v. *Horton*, 7 T. R. 652; *Doe* v. *Willan*, 2 Bar. & Ald. 84; *Gibson* v. *Lord Montfort*, 1 Ves. 485.

VICE-CHANCELLOR'S COURT.—JAN. 30, 1836.

JONES *v.* JONES.

On the 10th of August, 1799, William Jones entered into a contract for the sale of an estate to Mary Jones, the mother of Mary Jones, the plaintiff; but, before the conveyance was made, he executed a deed of trust, by which he conveyed all his real estates to trustees, E. Jones and Roberts, in trust, to sell and to pay his creditors; and it was declared, that the trustees' receipts were to be sufficient discharges to purchasers. The trustees sold a portion of the property to the same Mary Jones who entered into the contract of 1779. Mary Jones entered into possession in 1809, and died in 1812, leaving Mary Jones, the plaintiff, her heir at law and next of kin, who took out letters of administration.

William Jones died in 1823, leaving his heir at law an infant.

All the trustees died, and the last surviving trustee left an infant heir; and a trustee was appointed by the Court under the statute.

The bill was filed for a specific performance of the agreement against the purchaser.

It was objected that there was no personal representative either of the last surviving trustee or of William Jones. On the other hand it was contended, that such representation was unnecessary, as the trustees had power to give receipts under the trust-deed, and that this power passed to the infant heir, and from him to the person appointed by the Court.

The VICE-CHANCELLOR said—William Jones contracted with Mary Jones for a sale of a portion of his estates. On this contract the purchase-money became a debt due from Mary Jones to William Jones. When William Jones conveyed to the trustees, he did not part with his right to the debt, although the lands passed to the trustees.

The trustees also made a contract with Mary Jones, which also became a debt due from her to them. This debt did not, on the death of the trustees, pass to the person appointed by the Court. He therefore thought, that the representatives of William Jones and of the surviving trustees ought to be brought before the Court.

ROLLS' COURT.—Feb. 16, 17, and 22, 1836.

Miller v. Woods.

In this case W. T. Woods, the son of the defendant, was appointed a tax-collector, by certain commissioners of taxes, and on that occasion he executed two several bonds for £5,900 and £63, in which his father, W. Woods, the defendant, and two other persons, were sureties, and became jointly and severally bound. These bonds were to secure the due and punctual payment of the taxes collected by W. T. Woods. In 1833, W. T. Woods became a defaulter for £1800, and the defendant, W. Woods, became liable, under the bonds, to make good the default; and being called on for payment, he deposited an indenture of lease with the commissioners, and executed a memorandum, dated 13th September, 1833, stating, that the lease was deposited as a security to the commissioners for payment of £1800, which he had become liable to pay as the surety of his son. It was admitted that the principal did not bear interest. The plaintiffs claimed as mortgagees, subsequent to the deposit being made, and had notice of the lien of the commissioners.

The question was, whether the commissioners could have an immediate sale of the premises, or whether the mortgagors were not entitled to six months' notice to redeem, and if not then redeemed, to sell.

The Master of the Rolls, during the argument, addressing Mr. Teed, (who appeared for the defendant Woods and the mortgagees,) said, there are many cases in which payment of interest will induce the Court to delay, and here you want delay without paying interest.

His Lordship afterwards said, in this case, no interest being paid, his impression was, that it would take it out of the decision of the Master of the Rolls, but he would consider his judgment.

Feb. 22.

The Master of the Rolls said, the admission in the answer of the defendant, W. Woods, that £1800 was due, did not bind the other defendants. It was contended, that an equitable mortgagee could not be put in a better position than a legal mortgagor, who was entitled to six months to redeem. On the other hand, it was stated, that no interest was paid, and that the commissioners would be put to great inconvenience in the accounts with the Tax Office, if there was not an immediate sale. His Lordship said he could not listen to circumstances as to the inconvenience: he had looked into the cases to see if he could find a case which would warrant his departing from the general rule, but he was unable to find other than that the deposit of title-deeds was to be considered as evidence of an intention to make a mortgage, and he was

sorry that it was out of his power to order an immediate sale. He had consulted the Lord Chancellor, who agreed with him, that *Parker* v. *Housefield* ought to be followed: and his Lordship ordered an account to be taken of what was due on the mortgage, and he allowed six months to redeem, and if not redeemed within that time, a sale was to take place; and he asked the plaintiff's counsel if he wished for a receiver, and being answered in the affirmative, he directed accordingly.

Counsel.—Mr. J. H. Palmer and Mr. Teed.

Cases cited.—*Pain* v. *Smith*, 2 Mylne & Keene, 417; *Parker* v. *Housefield*, 2 Mylne & Keene, 419.

VICE-CHANCELLOR'S COURT.—Feb. 20, 1836.

James *v.* Herriott.

This was a demurrer to a bill which prayed a discovery, and that the defendant might be restrained from commencing and prosecuting an action at law, and there was a prayer for process, but none for general relief.

The Vice-Chancellor said, that the person by whom he had the good fortune to be instructed, and who was then no more, always, in a bill of discovery, left out the prayer for a decree. It ought clearly to appear whether the bill is for discovery or for relief. There was nothing in the bill to show whether it was for a discovery or for relief. It does not appear on the bill that there was an account between the parties, but only a dealing between tradesman and customer. It appeared on the face of it to be intended for a bill of discovery. His Honour granted leave to amend, on payment of costs.

Cases cited.—*Close* v. *Tirrett*, in Exchequer, not reported; *Rose* v. *Gaunell*, 3 Atk. 439; *Brendon* v. *Sands*, 2 Ves. jun. 514; *Angell* v. *Westcombe*, 6 Sim. 31; *Ambury* v. *Jones*, 1 Younge, 199.

Feb. 23, 1836.

Powys *v.* Mansfield.

The question was, whether a legacy of £10,000 was adeemed by a settlement of another sum of £10,000?

His Honour, in giving judgment, went into the case at great length. It will be unnecessary to state the whole of the case, as it was decided on its own merits; but we will give the concluding observations of his Honour. He said he had examined all the cases of ademption, and he could not find a single instance of a person who was held to stand in *loco parentis* to a child, where that child had its parents living, with whom it lived, and by whom it was supported. He could suppose such a case of a parent de-

serting a child, and where, by possibility, the relation might exist; but he could find no such case amongst the authorities. His Honour went on to say, that it was a matter of great importance in this case, that Sir J. Barrington had confirmed his will in every particular by a subsequent codicil. That was a point upon which great stress was laid in the case of *Roome* v. *Roome*, 3 Atk. 181. His Honour said that the law on this subject was expressed in the most simple and beautiful manner by Lord Eldon, who, from his great powers of mind, had compressed it within a very small compass in *Trimmer* v. *Bayne*, 7 Ves. 515. His Honour here read the words of Lord Eldon in *Trimmer* v. *Bayne*, 7 Ves. 515, where he lays down the rule as to the ademption of a legacy by a person in *loco parentis*. His Honour also referred to two passages in *Pye* v. *Dubost*, 18 Ves. 151, 153, in support of the same doctrine; but his Honour observed, that it was also maintained, that a presumption of this sort might be deduced from identity of provision; but in this case he was of opinion, that although it was true the amounts were the same, yet the nature of the provisions were totally different. One of them was charged on a reversion which might never be raisable. Any husband or children were interested in the provision made by the will, but none but Mr. Powys and his children, by that marriage, could take under the settlement. With regard to the rule of presumption, great judges differed as to its propriety. Lord Hardwick, Lord Thurlow, and Lord Eldon, disapproved of the rule, but Lord Kenyon and Sir J. Leach thought it a good rule. Yet the five cases of the latter judge, which were decided by him on this rule, afforded a proof how inconveniently the rule operated. Some did not approve of abstract and technical rules of law; and Sir Harris Nicholas had in his work approved of the rule *infra quatuor maria*, because it prevented questions; but the rule as to presumption of ademption was of a very opposite character, for it tended to involve property in questions. Upon a review of the whole case, he was of opinion that the defendants had not made out a case of presumption.

FEB. 13, 1836.

BIGGS *v.* WREN.

Two sisters were tenants in common in tail, with benefit of survivorship, one of them died under age; this was an application to have the by-gone rents of the deceased tenant's share, applied in payment of the expenses incurred for her maintenance.

The VICE-CHANCELLOR said this could not be done, unless her personal representative was brought before the Court.

COURT OF EXCHEQUER.—Feb. 24, 1836.

(Before Baron Alderson.)

Brooksbank *v.* Smith.

In this case, trustees under a will, who were solicitors, had by mistake transferred stock to a person not entitled.

Baron Alderson said, this being under circumstances of mistake, it appeared clear to him that the plaintiffs were entitled to equitable relief; for, on looking into the authorities he found that fraud or mistake were each of them grounds for relief in equity. Then came the question, whether the statute of limitations was a bar? The statute of limitations did not apply to courts of equity so as to bind them. Undoubtedly they had exercised discretion, and very rightly, upon the rules laid down. For instance, in cases of fraud, courts of equity did not apply the rule in the same manner as courts of law, which were so bound by the words of the statute, that if the cause of action had occurred more than six years before, however equitable it might be, they could not permit the statute to run. Courts of equity held, that in cases of fraud, the statute of limitations ran from the discovery of the fraud. It appeared to him, that cases of mistake fell under the same rule, and that it would be inequitable to apply the statute of limitations, except in cases where a party had lain by after the mistake had been discovered, more than six years; in this case the mistake had been discovered within six years. the statute did not, therefore, bar the plaintiff's claim.

ROLLS' COURT.—Feb. 22, 1836.

Molloy *v.* Hurst.

The original bill was filed by Mrs. Molloy, against certain trustees and executors, to have the benefit of a legacy. A testator had given all the residue of his property to trustees, and directed them to place out in the funds a sum sufficient to produce an annuity of 50*l*, which he gave to his "niece, Bridget, lately living in Dublin, with Lady Ann Wealey," and after her decease, the stock to be divided amongst such of her children as should be living at her decease. There was no niece of the name of Bridget living with Lady Ann Wealey, but there was a niece named Mary, the present plaintiff; the mother of the plaintiff was the testator's sister, and her name was Bridget. By a decree made in 1834, it was referred to the Master to inquire who was meant in the will, by the words, "my niece, Bridget."

The Master reported, Mary Molloy to be that person, upon which exceptions were filed to his report.

It appears that the testator had several brothers and sisters,

one of whom Mary Arthur, had lived forty years with Lady Ann Wealey, as cook and housekeeper; and Mary Molloy, the niece, had lived nineteen years as housemaid; it also appeared that several other nieces used sometimes to visit their relatives at Lady Ann Wealey's, and occasionally eat, drank, and slept there. It was contended that one of these might be the object of the testator's bounty, as he happened to be in Dublin during one of these visits.

The MASTER OF THE ROLLS said, the question turned on the meaning of the words "my niece, Bridget, lately living in Dublin, with Lady Ann Wealey." It appeared that the plaintiff's mother was named Bridget, and there was no other person in the family of that name. The testator, in describing his niece might have fallen into an error by having in mind, Bridget, the mother's name; the evidence also showed what must have been his intention. Ellen Rochford's evidence only tended to prove that the other nieces occasionally eat, drank, and slept at Lady Ann Wealey's, sometimes with her knowledge, and sometimes without, this, it was contended, meant residing; if that was the meaning, and every householder in London knew of all the eating, drinking, and sleeping in their houses, they would have reason to think they had a great many persons residing with them; it was not enough to show that there was occasional eating, drinking, and sleeping.

His Lordship also said, that it was unnecessary for the Master to have inserted an advertisement to ascertain the legatee, and that he had rightly reported.

Counsel.—Mr. Beames, Mr. Tinney, Mr. Richards.

JAN. 28, 1836.

GREENWOOD *v.* BARRSLOW.

Mr. Elmsley moved, in this case, to dissolve an injunction obtained ex parte, which restrained the defendant from cultivating, contrary to the custom of the county, a farm which he held as tenant from year to year, under Lord Milton; it appears that his lordship's steward had given the tenant permission to farm the land as he liked, on the faith of this permission he laid out more money than he otherwise would have done. His lordship afterwards sold the estate to the plaintiffs; the tenant, however, still continued his method of cultivation.

Under these circumstances it was argued, that the purchasers not having notice of this agreement, were not bound by it.

The MASTER OF THE ROLLS said, he considered it as settled, that a purchaser knowing that there was a tenant on the property, had notice of the terms on which he held, and that, as they had not given him the usual six months' notice to quit, he had a right to hold on till the tenancy expired by proper notice, and upon the same terms under which he had hitherto held, and he dissolved the injunction with costs.

VICE-CHANCELLOR'S COURT.—Feb. 25, 1836.

Gale *v.* Currie.

This was a motion for an injunction to stay the defendant from distraining on the plaintiff.

W. Abbott having an underlease of a house in the City of London, of which about four years and nine months were unexpired, let the same to Mrs. Gale, a weekly tenant, at 6*l.* a-week. There was a debt of 100*l.* due to Mrs. Gale from W. Abbott, who gave a promissory note for payment, and there was an understanding that the plaintiff should retain the rent in order to pay herself; shortly afterwards Abbott sold this property to the defendant for 18*l.*, and the fixtures and furniture (which in fact belonged to the plaintiff,) for 40*l.*; there was a clear yearly rent of 250*l.* to Abbott after paying the rent to the superior landlord, but it did not appear who had to pay the taxes, though it was presumed to be paid by Abbott. Mrs. Gale refused to pay the rent to the assignee, but retained it according to the agreement; on this Mrs. Currie distrained from week to week; it was not shown, or was it admitted by Mrs. Currie, that there was notice of the agreement; Mrs. Currie, however, admitted that she had notice of the debt, and that Mrs. Gale was tenant, and that she had a conversation with Abbott about the payment of the debt.

His Honour said, he did not see that the admissions (as was contended for by Mr. Knight,) were sufficient to warrant his granting the injunction, which he refused with costs.

Feb. 13, 1836.

Davies *v.* Thornycroft.

This was a limitation to the separate use of a feme sole, independent of any future husband, with power of appointment. She married, without exercising her power, and her husband became a bankrupt and she then appointed to the plaintiff. The present bill was filed to carry the appointment into effect. The assignees of the husband opposed it on the ground that the property passed to them, subject to the wife's equity to a settlement.

The Vice-Chancellor said that he had conversed with Sir E. Sugden on the subject, who agreed with him, and had always understood it was competent for a person to limit property to the separate use of a single woman, and that was the invariable practice of the profession, although it might be inferred from some expressions of the present Lord Chancellor in *Massey* v. *Parker*, 2 Mylne & Keene, 174, that such was not his opinion; yet that case was certainly not a decision on the subject; and, looking at the language of his Lordship, it would appear he was rather addressing himself to the restraint upon alienation than the limitation to the separate use. If any authority applied, it was the decision in

Simpson v. *Jones*, 2 Russ. & Mil. 365. He should be sorry to be thought to have the slightest doubt on the subject; and if he were sitting in chambers as a counsel, he would not have hesitated to say this was a perfectly good limitation to the separate use of the lady. But he begged to be understood, in giving his judgment, that he considered the Lord Chancellor had not decided otherwise.

Counsel.—Mr. Wigram, Mr. Parry, Mr. Knight, and Mr. Walker.

COURT OF CHANCERY.—March 3, 1836.

Slaney *v.* Wade.

An issue had been directed by his Honour the Vice-Chancellor, to ascertain whether the plaintiff was descended from a person of the name of Richard Moreton. The jury found for the plaintiff. A motion was, in consequence, made on the 13th of January, 1836, to his Honour, for a new trial, on which occasion it was contended, that the evidence was not properly received by the jury.

His Honour said, that whether the evidence was properly received or not, was not sufficient for granting a new trial—*Barker* v. *Ray*, 2 Russ. 63; but that, in this case, the evidence was properly received.

It appears that the evidence consisted of a mural inscription in the chancel of the church of Shiffnal, in Shropshire, called the Moreton Chancel. This inscription had been legible in 1810, but had since been obliterated: four copies, however, were made, all of which agreed together. One of the copies most relied on had been written in pencil, and afterwards traced over in ink. This inscription, his Honour said, was good evidence to show the plaintiff's descent; and he also held, that a bill and answer was good for that purpose. In proof of the legitimacy of the plaintiff, a deed, describing him as "my relation," was held sufficient proof of such legitimacy, if nothing to the contrary appeared; and his Honour refused the motion, with costs.

This decision of the Vice-Chancellor was appealed against, and the appeal was heard before the Lord Chancellor on the 20th of February.

March 3.

His Lordship, in giving judgment, said this was an appeal from an order of the Vice-Chancellor, refusing a new trial of an issue directed to ascertain whether a claim founded on a pedigree could be established. The plaintiff claimed to be allowed to redeem a mortgage which was vested in the defendant, and he made the claim as the next of kin of the original testator and owner of the estate. A question was raised on the pleadings as to the validity of the plaintiff's title to be considered the next of kin, and an issue was directed to ascertain whether the plaintiff could satisfactorily

make out his descent from Richard Moreton. The jury found in the plaintiff's favour, and an application was then made to the Vice-Chancellor for a new trial, on the ground that the evidence touching the pedigree, and particularly with respect to a certain inscription on the wall of a church, had been improperly received, and that, even if properly received, that it did not establish the connection of the plaintiff with the family of the Moretons. The Vice-Chancellor refused this application, and the matter was again fully argued on the appeal. The two points pressed most strongly on the attention of his Lordship were, whether sufficient evidence of the pedigree had been brought forward at the trial, and whether Robert Moreton, who was a lunatic, had been satisfactorily proved to be the legitimate child of Slaney Moreton and Elizabeth Broadwood, his wife. With respect to the point of pedigree, the plaintiff had produced at the trial a document in the handwriting of a Mr. Aglionby Moreton, a member of the family and a professional person; and his Lordship was clearly of opinion, that this document was properly received as evidence upon those principles which had long been held as regulating the proofs required by law in cases of pedigree. It was a paper prepared by a person, who, from his connection with the Moreton family, had the means of ascertaining what was the belief of that family with respect to its several branches, and who had himself no interest whatever in the property which formed the subject of contention. The document had been admitted for the consideration of the jury, on the ground that the writer had not himself any knowledge of the facts, but merely that he was well-acquainted with the hereditary belief of several members of the family most interested in such a question, and most likely to have investigated all the circumstances connected with the descent.

To support this document and the question of the pedigree generally, evidence was given with respect to a certain mural tablet in the church of Shiffnal, in Shropshire, which was said to have been legible as late as the year 1810. Two witnesses had been examined at the trial in support of this part of the evidence. To one of these witnesses strong objection had been taken, and his Lordship therefore put his testimony altogether out of his consideration. The other witness, a man named Adams, stated that he held a parochial office at the time, and that when the church in question was in repair, he, by the direction of the clergyman, took a copy of the inscription in pencil, which inscription was then perfectly legible, and that the inscription so taken was afterwards traced over in ink by the clergyman, who considered it a part of his duty to preserve this and one or two other similar monuments, in the event of their being thought an object to the families. This inscription so taken in pencil and traced in ink, was produced at the trial, and sworn to by Adams, who pointed out some mark of the pencil still remaining, the tablet itself being

shortly afterwards, viz. in 1810, plaistered over and defaced. Now, it was quite clear that this paper was one which the witness, Adams, had a right to refer to for the purpose of refreshing his memory. If the paper had remained as he wrote it with pencil, no one would have ventured to raise a doubt on the subject, and the circumstance of its being afterwards traced over, did not destroy that right when he was able so fully to prove its identity. Now, with this copy Adams stated that the inscription on the tablet, which was a short history of the Moreton family, perfectly agreed; and as the inscription (if it had remained in its place in the church), would have been (according to the rules of evidence with respect to pedigrees) perfectly admissible; his Lordship thought that good secondary evidence afforded by the copy, was also, from the circumstances, properly receivable, and that it went to establish the point of pedigree which the plaintiff sought to maintain.

On the second point, the legitimacy of Robert Moreton, the lunatic, his Lordship thought that fact already established, and there was no reason to doubt that the jury had come to a right conclusion on the points subjected to their consideration.

The case then, being one which a court of equity had the power to determine without the assistance of a court of law, but one in which it had thought fit to require that assistance; and the verdict of the jury, on the trial of the issue which the Court had directed, appearing in all respects to be satisfactory, his Lordship saw no reason to doubt that his Honour, the Vice-Chancellor, had come to a sound conclusion, in refusing the application for any further proceedings at law, and that the appeal must therefore be dismissed.

The circumstances of the case were of a peculiar nature, or his Lordship might have been disposed to have dismissed such an appeal with costs, but under the circumstance, his Lordship would say nothing as to costs.

Counsel.—Mr. Sergeant Talfourd, Mr. Barber, Mr. Wigram, Mr. V. Richards, the Attorney-General, Mr. Knight, and Mr. Maule.

VICE-CHANCELLOR'S COURT.—March 2, 1836.

Johnson *v.* Freeth.

The following question came before the Court on demurrer:—A testator, G. Grant, bequeathed to Elizabeth Grant and her assigns, for and during the term of her natural life, an annuity of £200, clear of all deductions, (the said annuity to be paid by half yearly payments,) for her sole and separate use and benefit, free from the debts or engagements of any husband with whom she might intermarry: and the testator declared, that her receipts

alone, notwithstanding her coverture, or of the person or persons to whom she should, from time to time, but not by way of anticipation, appoint the same, should be the only sufficient discharges. The two defendants were the trustees of the will. After the death of the testator, Elizabeth Cox married Charles Boniface, but no settlement was made on the marriage. Charles Boniface and his wife, by indentures, granted and appointed unto the plaintiff, J. H. Johnson, his executors, administrators, and assigns, during the life of the said Elizabeth Boniface, an annuity of £61 : 16*s.* : 1*d.* to be charged upon and payable out of the said sum of £200; and the said C. Boniface and Elizabeth his wife, appointed and assigned unto the said J. H. Johnson, his executors, administrators, and assigns, the said sum of £200, during the life of the said Elizabeth Boniface, upon trust to permit Elizabeth Boniface to receive the annuity of £200, until default in payment of the said annuity of £61 : 16*s.* : 1*d.* and all arrears and costs, and to pay the surplus to Elizabeth Boniface.

The question was, whether the clause against anticipation took effect on the marriage, or whether it was altogether inoperative at the time the wife took, there being no marriage then in contemplation, and there being no limitation over in case of anticipation.

It was contended that this point had never been decided, and that it had only been brought before the Court on petition; and it was also contended, that the clause against anticipation might be engrafted on the gift to the separate use.

The VICE-CHANCELLOR, during the argument, said, whatever might have been the law in *Parkes* v. *White*, it appeared that the law had undergone a change: he had forgotten that the case of *Newton* v. *Read* had ever been before him, till he was reminded of it during the argument. It appeared to him that Lord Brougham had decided according to that case, and he, the Vice-Chancellor, could see no difference between that and the present case.

The Counsel said, the property was divided in the case of *Newton* v. *Read*, which distinguishes it from this case.

The VICE-CHANCELLOR said, there is that difference certainly, but in both cases there are words against anticipation.

His Honour in giving judgment, said, it seems to be decided in this way:—First, as the law formerly stood, the Court could not, as it appears, notice the clause against anticipation, before Lord Thurlow began to recognise the present doctrine in the case of *Miss Watson's Settlement* and of *Parkes* v. *White*, 11 Ves. 221. This doctrine was afterwards followed up by Lord Alvanley in *Sockett* v. *Wray*, 4 Brown, 483, and subsequently by Lord Eldon, in *Jackson* v. *Hobhouse*, 2 Mer. 487, and *Jones* v. *Harris*, 9 Ves. 486. His Honour then said, it appears to me the law now stands in this condition—that only during the marriage the clause against anticipation is to be taken as entirely operative; but when the clause against anticipation is made where the person is single, it is

different. Supposing the case of an infant, or of a person who had not the least intention of marrying, there could be no doubt that she might dispose of the property in any way she should think fit, as in the case of *Woodmaston* v. *Walker*, 2 Russ. & Mylne, 192; *Newton* v. *Read*, 4 Sim. 141; *Brown* v. *Pocock*, 5 Sim. 663. Or supposing the case of a woman having married, and afterwards becoming a widow, the same rule would apply, as in the case of *Jones* v. *Salter*, 2 Russ & Mylne, 208, and *Barton* and *Briscoe*, Jac. 603.

Upon the whole, therefore, I consider the law to be settled that the clause against anticipation is void unless the party had been married, or a marriage was in prospect. In the case of a gift to a person unmarried, or to a person under coverture, who afterwards became discovert, the clause against anticipation would not apply. There was a great deal of uncertainty in the profession as to the clause of anticipation, till the case came before Lord Thurlow; but I now consider it perfectly settled. If I am wrong in my decision in the present case, it appears to me that the Lord Chancellor, or some greater authority than myself, ought to set the question at rest. As it is, I must overrule the demurrer.

Counsel.—Mr. E. J. Lloyd, Mr. Chandless, Mr. Prater.

Cases cited.—*Parkes* v. *White*, 11 Ves. 221; *Newton* v. *Read*, 4 Sim. 141; *Brown* v. *Pocock*, 5 Sim. 663; *Barton* v. *Briscoe*, Jac. 603; *Woodmaston* v. *Walker*, 2 Russ. & Mylne, 192; *Jones* v. *Salter*, 2 Russ. & Milne, 208.

COURT OF CHANCERY.—Jan. 23, 1836.

Stiffe *v.* Everett.

This case was not noticed in the arguments in the last case of *Johnson* v. *Freeth*, though we conceive that it applies to that case; we shall therefore notice it here. The case (as we understand) was this—a petition had been presented to the Lord Chancellor, when Master of the Rolls, to have a sum of money paid to the husband of a lady who was entitled under a will to the interest of the sum during her life, with a power of appointment over the principal, to take effect after her death, and with a restraint against anticipation. The lady became entitled before she married: after her marriage she appointed to her husband. It was contended that, as the wife was unmarried when she took the clause against anticipation, was inoperative, and that she had an absolute controul over the property, and that consequently her husband became entitled to the same right on her marriage.

On hearing the petition, his Lordship desired the case to stand over, in order that some authority might be shown for making the order. The case was again brought forward before his Lordship,

when Lord Chancellor, but there was no further arguments, and no authorities produced. Under these circumstances his Lordship was bound to dismiss the petition.

VICE-CHANCELLOR'S COURT.—Feb. 2, 1836.

Van Calster *v.* Yapp.

The question arose on the words in a letter written by a lady, where she said, after the death of a person to whom she had previously given a sum of money in the funds, "that should he have a family, he should have it secured to them."

His Honour said, the words "family" meant his children, and that they would take as joint tenants.

Note.—A question on the word "family," has arisen in a case now before the Master of the Rolls, not yet decided. His Lordship, during the arguments said, the construction of the word "family" must depend on the peculiar circumstance attending such case.—*Ed.*

Feb. —, 1836.

Colston *v.* Pemberton.

A settlement contained a power of appointment to the children of the marriage "at such time, manner, and form," as the survivor of husband and wife should, by any deed or instrument in writing, appoint, and in default of appointment, to the children equally, as tenants in common, to the sons at twenty-one, and to the daughters at that age or marriage. The wife survived, and there were nine children of the marriage; one died an infant, and unmarried, others attained twenty-one, and died before the power of appointment was executed. The wife executed two appointments, the first appointment, in 1819, was of one eighth in favour of a daughter, who afterwards died: in 1832, the second appointment of the residue of the fund amongst her surviving children. Two questions arose; first, whether the appointor had not exhausted her power by the first appointment in 1819, as the power only authorized her to appoint by any *deed or instrument.* The other question was, whether the appointment to the surviving children was good.

The Vice-Chancellor thought, that the case of *Boyle* v. *The Bishop of Peterborough* had settled the question—that when a power was general, it might be executed in favour of the surviving children. Lord Eldon, in *Butcher* v. *Butcher*, said, that *Boyle* v. *The Bishop of Peterborough* ought not to be adhered to; he, the Vice-Chancellor wished he could agree in that opinion. Lord Eldon, however, did not decide on the authority of that case, but on the peculiar circumstances in the case before him.

The Vice-Chancellor was of opinion, that *Boyle* v. *The Bishop of Peterborough* would apply to this case; the appointor had ap-

pointed one eighth to her daughter, and the remaining seven eighths amongst the four surviving children. All had attained twenty-one. He thought the appointment unquestionable.

The costs to be paid out of the whole fund.

In the course of the argument, his Honour said, that the words, "in manner and form," would empower a person to appoint at any time or times.

Cases cited.—*Vane* v. *Lord Dungannon*, 2 Schol. & Lef. 118; *M'Ghie* v. *M'Ghie*, 2 Mad. 368; *Boyle* v. *The Bishop of Peterborough*, 3 Bro. C. C. 243; 1 Ves. jun. 299; *Butcher* v. *Butcher*, 1 Ves. & Bea. 79.

ROLLS' COURT.—Feb. 16, 1836.

Malcolm *v.* Charleworth.

A question arose in this case, whether the assignment of a legacy (which was to be raised by sale of a competent part of certain lands after the death of the tenant for life,) required registration, the lands which were charged being situated in the North Riding of the County of York.

The Master of the Rolls held, that it was an assignment of money, and not of an interest in land which required registration.

Counsel.—Mr. Beames, Mr. Pemberton, and Mr. Munro.

VICE-CHANCELLOR'S COURT.—March 5 & 7, 1836.

Brook *v.* Turner.

The following case was heard on further directions:—Mrs. Brook, late of Chipping Sodbury, by her will, bearing date the 29th of April, 1830, gave certain real estates at Horton and elsewhere, to trustees, to receive the rents, and pay to Catherine Dorothy Jones, her niece, the sum of £200 per annum, until she should attain the age of twenty-seven years, or become a housekeeper previous to that age; and the sum of £300 in case she should become a housekeeper before attaining her age of twenty-seven years. The testatrix then made a bequest of so much stock as would make up, together with the rents of the estate, the sum of £500 per annum, to be paid upon her attaining the age of twenty-seven years. Miss Jones was also to receive a further legacy of £500. The testatrix then gave and bequeathed all her pictures and paintings in and about her house at Chipping Sodbury and Horton, and her collection of foreign and other coins of gold, silver, and copper, except those of the two last and present reigns, to her niece, Catherine Dorothy Jones, together with her marble figures, telescope, china jars, ornaments, parrots, books, furniture, plate, linen, china, clothes, pearls, trinkets, carriage,

and horses, and all other similar moveable things in and about her house, except minerals, fossils, shells, and curiosities, which she gave to another person.

After this came the following clause :—"I direct, from and after the day of my interment, that all my property, of every sort or kind over which I have any disposing power, in and about my dwelling-house (except what I have otherwise given,) shall exclusively belong to my niece, Catherine Dorothy Jones, and not be subject to diminution, except by her own personal act."

Upon the decease of the testatrix, there was found hid up in different parts of her house, property to the amount of £10,000. In two small bags was found £777, consisting of sovereigns, guineas, and silver. In another part of the house, amongst a quantity of old rags, 400 sovereigns were discovered, tied up in the top of an old stocking; bank notes to a large amount, between the leaves of books; in a cupboard made in one of the steps of the stairs, upwards of £3000 in notes. Besides these sums, Bank of England notes, country bank notes, promissory notes, and other securities were found.

The question in this case was, whether the money, bank notes, promissory notes, country notes, and other securities for money, passed under the general words of the will—"every kind of property in and about my house."

It was contended, that the bank notes, promissory notes, and other securities, were not money, but merely evidences of money, and therefore would not pass under these general words.

The VICE-CHANCELLOR was of opinion that there could be no doubt whatever of the intention of the testatrix to include her coins of the present and two last reigns in the words "property in or about my house," as she kept so continually in view the fact that she possessed money. He also said, his opinion was that the intention of the testatrix had been to include, under the general words, all her property in the house; but he was sorry to say, that, from the legal meaning of the terms used, and the cases upon the subject, he was unable to include more of that property than the coins of the two last and present reigns and the Bank of England notes.

Counsel.—Mr. Jacob, Mr. Knight, Mr. Wakefield, Mr. Barber, Mr. Wigram, Mr. Pigot, Mr. Parry, Mr. Dixon.

Cases cited.—*Woolcomb* v. *Woolcomb*, 3 P. Williams, 112; *Roberts* v. *Kuffin*, 2 Atk. 112; *Jones* v. *Lord Sefton*, 4 Ves. 166; *Moore* v. *Moore*, 1 Brown, 127; *Hastings* v. *Hane*, 6 Sim. 67; *Read* v. *Stewart*, 4 Russel, 69.

ROLLS' COURT.—March 5, 1836.

Kay v. Marshall.

His Lordship, in giving judgment to-day in this case, which had been argued the day before, said,—This was a motion for leave to file a double plea. The bill was filed in 1835, by a person who alleged that he was entitled under certain letters patent which had been infringed by the defendant. To this bill special leave was given to demur, and the demurrer was filed the 15th of April, 1835. After the demurrer was filed, the plaintiff thought fit to amend. To the amended bill a demurrer was filed, which was argued before the Vice-Chancellor, and rejected; and on the 1st of February it was argued before the Lord Chancellor, on appeal, and also overruled, on which occasion the defendant obtained six weeks' leave to answer.

The first question was, whether the defendant was at liberty to put in a plea, under the leave to answer, without making application to the Court. His Lordship thought that he was; in support of which opinion he cited *Anon.* 2 P. W. 464; *Jones* v. *Strafford*, 3 P. W. 81; *Roberts* v. *Hartley*, 1 Bro. C. C. 56; *De Minckuitz* v. *Udney*, 16 Ves. 355; *Barber* v. *Crawshaw*, 6 Mad. 284.

In the last case, Sir John Leach desired not to be understood as giving an opinion, that if the commission had been merely to take the defendant's answer, they could have put in a plea. The next point was, whether the defendant, having a right to put in a single plea, he could also be allowed to put in a double plea, within the time allowed. Whether the defendant did wish to extend the time, and on an application to extend the time, he had a right to put in a single and also a double plea.

Considerable doubts had been expressed on the subject: the practice of the Court, however, had hitherto been, only to allow it where there was a double claim, but nothing had occurred in the proceedings to show the principles on which the Court proceeds. It appeared to him that the principle will depend on the inconvenience of the defendant. As to the power to decline answering further, the judges differed on the subject. The defendant denied the principle that he was not entitled to refuse to answer. On the other hand, it was said, if it was allowed to put in a double plea, it would be allowed to three, four, or more, (that is,) the defendant may plead a single plea, but he cannot two, without applying to the Court and giving notice, and permission must be granted. What was said by Lord Thurlow was sufficient to govern this case; there were very many cases on the subject; it was considered a doubtful case, but it was said that Lord Eldon had decided the case, and it was said that the Vice-Chancellor founded his decision on that case: but he, Lord Langdale, had not been able to find any such decision of the Vice-Chancellor

in the reported cases. Certainly if you answer at all you must answer fully; the only difference of answering by demurrer or by plea is, that the plea is used in order to counteract the ingenuity which is sometimes used by counsel to extract, if possible, and to take advantage of a discovery which ought not to have been made. This is an application to put in a double plea; and it appeared to his Lordship that the plaintiffs had no right, in their bill, to point out the mode of defence. His Lordship could not find a decision on the point; but the defendant was certainly entitled to a great indulgence from the Court. The foundation of his claim was attended with great uncertainty, difficulty and loss, and a case in which there were difficult and intricate accounts. The defendant was not seeking a great indulgence: he must, therefore, allow this application.

The counsel, at the conclusion of the judgment, mentioned the case of *Rowley* v. *Eccles*, 1 Sim. & Stuart, 511, as the decision which had been alluded to. The case was, that where a demurrer is overruled, the defendant cannot plead to the bill without the leave of the Court.

His Lordship, however, said, that the peculiar circumstances of this case would warrant his departing from the usual course.

March 5, 1836.

Metcalfe *v.* Metcalfe.

This was a demurrer to a bill of revivor, on two grounds: first, that the personal representatives of Sarah Wilson were necessary parties; and secondly, that prerogative administration in Canterbury, ought to be taken out to Sarah Wilson.

Mrs. Wilson, the mother of Sarah Wilson, being entitled to certain property in Yorkshire, made her will, and gave that property to her four children, one of whom was Sarah Wilson. The original bill was filed in 1803, by G. Wilson and Sarah Wilson, his wife, in her right; and by her brother, another of the children, against another devisee, and other persons who were representatives of a mortgagee in possession. The object of the bill was, to redeem, and for an account, and for sale of the property; the monies to arise by sale might be paid into Court and that to the credit of the cause.

In 1814 the suit was revived; and in June, 1819, there was a decree for an account of what was due to the mortgagees, for principal and interest, and for an account of the rents and profits received by the mortgagees, and the Master was to fix an occupation rent. In 1825 he made his report, in which it appeared that the mortgage money was paid off, by receipt of the rents and profits so early as 1801.

In 1824 a decree was made for sale of the estates, and the money to arise by sale was to be paid into Court, to the credit of money to arise by sale was to be paid into Court, to the credit of the cause. The estate was accordingly sold. In April, 1826, the

Master reported, that there was a balance due, by the mortgagees, in respect of the receipt of the rents and profits while in possession; and in June, 1826, there was an order, on further directions, to pay the money into Court. The Master made another report, as to what sums were due from the different defendants: one of them was afterwards taken into custody for non-performance of the order for payment into Court. Sarah Wilson died after the decree in 1824; but before the order for further directions, made in June, 1826, there was no representation taken out to her. No money had been paid into Court.

It was contended that, as S. Wilson died between the decree in 1824, and the decree for further directions in 1826, the latter decree was defective, there being no representative of the wife before the Court at the time the decree was pronounced. It was also contended, that the bill could not be revived without taking out prerogative administration to S. Wilson in the court of Canterbury, the Court of Chancery being within that province. On this point the case of *Young* v. *Elworthy*, 1 Mylne & Keen, 215, was relied upon; and it was stated, that the only difference between this case and *Young* v. *Elworthy* was, that this case was in respect of an administration, and *Young* v. *Elworthy* in respect of an executor, and that in the case of *Pearce* v. *Pearce*, (as we understood, though we cannot find such a case reported,) it had been distinctly recognised. On the other hand, it was contended that there cannot be a demurrer to a bill of revivor for want of parties.

The Master of the Rolls, in giving judgment, said, it did appear to him that a demurrer might be sustained, if there was no prerogative administration taken out of the Court of Canterbury, where the money had been paid into the Court of Chancery. Now in the present case no step had been taken to pay the money into Court; and though it did not appear whether there was *bona notabilia* out of the province of York, yet there cannot be *bona notabilia* in the province of Canterbury, unless, by an order of the Court, the money was paid into Court, in which case, it will become *bona notabilia* in the province of Canterbury, so as to establish a demurrer.

The objection for want of parties could not hold in this case, for the husband was entitled as representative of his wife. In some cases, however, where the ecclesiastical court is bound to grant administration, the persons to whom the administration is granted have been looked upon in this court as mere trustees for the husband. The object of the bill of revivor is to put the parties in all respects in the same state as before, and this can be done without the representatives of S. Wilson being parties.

It was objected by Mr. Daniel, that neither the wife nor her personal representatives were parties to the suit at the time the decree of 1826 was made; his Lordship, however, thought that

it was unnecessary at that time, for he considered that the suit might be put in the same state and condition without making the representatives of S. Wilson parties. He was of opinion, that the demurrer could not be sustained.

Counsel.—Mr. Beames, Mr. Turner, Mr. Daniel.

Cases cited.—1 Hagg. Eccl. Rep. 625, 633; *Sweet* v. *Partridge*, 5 Ves. 146; *Challnor* v. *Murhall*, 6 Ves. 118; *Newman* v. *Hodgson*, 7 Ves. 409; *Young* v. *Ellworthy*, 1 M. & R. 215; *Elliott* v. *Collier*, 2 Atk. 526.

VICE-CHANCELLOR'S COURT.—March 9, 1836.

Smith *v.* Evans.

Imperfect Decree—Bill of Revivor—Proper Parties to Suit.

J. Stephens Moythan devised all his real and personal estates to Edward Wellings and Henry Wellings, their heirs, executors, and administrators, upon trust, to sell and apply the proceeds in payment of various legacies. Three days after the date of the will, the testator contracted for the sale of the real estates, and died before the contract was completed.

A creditor's suit was instituted after his decease, and the trustees and legatees interested in the real estates under the will were made defendants.

In the course of the proceedings the Master had reported that the contract was a valid contract, and consequently, a revocation in equity of the will; and the question was, whether the legatees were proper parties to the suit.

The Vice-Chancellor, in giving his judgment, said, when the bill was filed, it was uncertain whether the contract was valid or not; and therefore the parties interested under the will were properly made parties to the suit, as interested in the discussion of that question. When a good title was reported, it appeared that they were no longer necessary parties, and the bill might be dismissed as against them.

In the course of the argument, the Vice-Chancellor held, that where a decree was taken, and at the time of the decree a party to the suit was dead, the decree would be imperfect, and could not be remedied by a subsequent bill of revivor against the representatives of the deceased party; for the prayer of the bill of revivor was, that the suit might be put in the same plight as it was in at the time of the abatement, and at that time there was no decree.

Counsel for the Plaintiffs.—Mr. Wakefield, Mr. Lewin.

Counsel for different Defendants.—Mr. Knight, Mr. Boteler, Mr. Kenyon Parker, Mr. Romilly, Mr. Wood.

Case cited.—*Jones* v. *Powell*, before the Lords Commissioners, not reported.

MARCH 18, 1836.

MACHELL *v.* WEEDING.

Vendor and Purchaser—Will, Construction of—Quasi *Estate Tail.*

This bill was filed against a purchaser for the specific performance of a contract which he refused to complete, as it was uncertain what estate the vendor had in the property, the subject of the contract. Joseph Machell, by his will, gave and bequeathed the whole of his copyhold and leasehold lands and all his personal property to his wife, for life, and after her decease to the plaintiff, Joseph Machell, his eldest son, to be enjoyed during his life, and after his decease, then to his first and other sons in tail male; "but if his son Joseph should die without issue, not leaving any children, the testator directed the estates to be sold, and the profits arising therefrom to be equally divided between his three younger sons, share and share alike, as tenants in common; but if any or either of them should happen to die during the lifetime of Joseph, then the testator directed the share or shares of such one or more so dying to be divided between his or their children, as tenants in common."

The question was, whether the plaintiff, Joseph Machell, took, under the words of the will, an estate for life or in tail in the copyholds, part of which was the subject of the contract?

A reference had been made to the Master to ascertain whether the vendor could not make out a good title. The Master reported in favour of the title, to which report exceptions were taken.

It was contended for the purchaser, that the words "not leaving any children" were added to explain the previous words "dying without issue;" and, therefore, that the testator must have meant, dying without issue living at the time of his decease; and that the words, in case either of his three sons should die during the life-time of Joseph, then the profits to be divided amongst the children of such son or sons so dying, could not mean an indefinite failure of issue on the part of Joseph.

It was also stated, that two eminent conveyancers had differed in opinion with regard to the construction of this will.

The cases cited in support of this view of the construction were *Doe and Webber* and *Doe and Frost.*

The VICE-CHANCELLOR, (having made up his mind before the arguments in answer were gone into,) in giving judgment, thought that the words "dying without issue, not leaving any children," described two events, and that the greater of the two ought to be given effect to; and by inserting the word "and," which, in the English language, would be of no great importance, the construction would be clear that it would not have gone over until failure of issue. His Honour also observed, that it might so happen, that Joseph Machell might have issue, and yet die without children; that is, in case a son died during his lifetime, leaving issue. His Honour, therefore, thought that this must be taken as

descriptive of dying without issue; consequently, it would give an estate tail.

By the conditions of sale, the purchaser, (in case of any delay in perfecting the purchase,) was to pay interest at £4 per cent. on the purchase-money.

The VICE-CHANCELLOR, therefore, ordered an account of the rents and profits (if any) to be taken and to be paid over to the purchaser. He also directed the purchaser to pay interest at £4 per cent. upon the purchase-money.

As to costs, Mr. Knight observed, that Sir Edward Sugden used to elect to pay the costs in such a case as the present, for the purpose of showing hereafter a more complete title, and requested his Honour would have consideration enough for the purchaser to allow him to pay the costs, merely for his own advantage.

The VICE-CHANCELLOR thought, that if the Court did not decree the purchaser to pay costs, the judgment would not appear so decisive, and, consequently, his title would not be so good. He therefore decreed him to pay the costs.

Counsel.—Mr. Knight, Mr. Wigram, and Mr. Garratt.

Cases cited.—*Doe and Webber*, 1 Barn. & Ald. and *Doe and Frost*, 3 Barn. & Ald.

COURT OF CHANCERY.—MARCH 11, 1836.

WILSON *v.* NESS.

Contempt of Court, Committal for — Decree — Prerogative Administration.

The mother of Sarah Wilson, being entitled to certain property, made a mortgage, and afterwards, by her will, directed all her real estates to be sold for payment of her debts and legacies; and, subject thereto, she directed the produce of her real estates to be equally divided amongst her children living at the time of her decease, share and share alike: she left four children, one of whom was Sarah Wilson, the plaintiff.

The bill had been filed by the husband of Sarah Wilson, in her right, and by herself, and also by her brother, against the administrators of the testatrix, the mortgagees, (who were in possession,) and others, for the purpose of having the real estates sold, and of having an account of what money was due on the mortgage, and that the mortgagees might re-convey.

The suit was afterwards revived, and in 1816 a decree was made, declaring that the will should be established and the trusts carried into execution, and it was referred to the Master to take an account of what was due on the mortgage, and to take an account of the rents and profits received by the mortgagees.

In 1825, the Master made his report, in which it appeared, that the mortgage-money had been paid off so early as 1801, and that

there was a balance due from the mortgagees on account of the rents and profits.

In 1826, there was a decree on further directions; and Sarah Wilson died before that decree was pronounced, viz., in 1825.

One of the defendants had been committed to the Fleet Prison for a contempt of court, in not having paid into court (under the decree of 1826,) the balance due on the mortgage.

There was no prerogative administration taken to the testatrix out of the Prerogative Court of Canterbury.

This was a motion to have the defendant discharged from custody, because, it was contended, the committal took place under a decree which was made at a time when all proper parties were not before the Court.

The Lord Chancellor said, the testatrix, by her will, directed her estates to be sold, and the produce, after payment of her debts, to be divided amongst her children. The original bill was filed for a proper administration of the will. One of the female plaintiffs married; and an account was directed to be taken as against the mortgagees. An objection was made that there had not been a proper administration to the estate before the Court at the time of the decree.

It appeared that the mortgagees had been overpaid, and had been directed to refund; and one of them was in prison for not having done so. The first question, therefore, was, whether the decree which was the cause of his committal was good, there having been no prerogative administration taken out to the testatrix out of the Prerogative Court of Canterbury. His Lordship said, that it did not appear whether there were *bona notabilia* in two provinces, or whether there were *bona notabilia* in the province of Canterbury, or elsewhere, at the time of the testatrix's death; and the representatives under the administration taken out of the province of York were the proper parties before the Court.

As to the question with respect to there not having been administration to Sarah Wilson, it appeared, that she died in 1825, before the decree on further directions made in 1826. The testatrix having directed the real estates to be sold, and the produce, after payment of the debts, to be divided amongst the children, the question was, to whom were the mortgagees to account for the rents and profits, and whether the property was to be considered land or money? If it was to be considered land, Mr. Wilson, in right of his wife, would be entitled to the receipt of the rents and profits; if it was to be considered money, neither she nor her husband would be entitled, but the legal representative of the testatrix, such person having to pay the debts out of it; so that in neither case was Sarah Wilson entitled, and, consequently, her representatives were not necessary parties. The decree was, therefore, good. One of the defendants having been ordered to pay £59 into court, and having made default, he was committed for

contempt of court. Before that decree, Sarah Wilson died, and there had been no objection taken to the proceedings at that time, so that the defendant had no right to account. His Lordship said he considered those to be the grounds for considering the present motion. He was of opinion that there was no irregularity in the committal of the defendant for contempt.

Counsel.—Mr. Beames, Mr. Daniel, Mr. Tamlyn.

Cases cited.—*Humphreys* v. *Humphreys*, 3 P. W. 349; 1 Hagg. Eccl. Rep. 633; *Gutteridge* v. *Stilwell*, 1 M. & K. 486; *Young* v. *Ellworthy*, 1 M. & K. 215.

ROLLS' COURT.—March 14, 1836.

Mackworth *v.* Hinxman.

Will, Construction of—Quasi *Estate Tail*—*Property to go with Baronetcy.*

The object of this suit was to have a declaration of the Court as to the construction of the following clause in the will of Philip Affleck, Esq. The will bore date the 12th January, 1797. The testator gave, devised, and bequeathed, to certain trustees therein named, all his shares and interest in the British Plate Glass Manufactory, and all his shares in the British Fishing Company, and all his shares in the Grand Junction Canal Company; and also certain other shares therein mentioned, in trust, that his trustees did and should receive the interest, dividends, and annual produce of the said shares, when and as the same should become due and payable, and pay the same to his nephew, Sir Gilbert Afflick, for life, and after his decease, then in trust, to pay the interest, dividends, and annual produce of the same shares, to be received as aforesaid, to the eldest son of the said Sir Gilbert Afflick, lawfully begotten; and if the said Sir Gilbert Afflick should die without leaving any son lawfully begotten, then in trust, to pay the interest, dividends, and annual produce of the said shares unto such person on whom the baronetcy of the Afflick family should devolve, so that the interest, dividends and annual produce of the said shares should never be alienated from the title. And in case the baronetcy should become extinct, then the said shares should fall into the residue of the testator's personal estate. The testator also gave a snuff-box, and certain plate, upon the same trusts, declared of the shares of the said companies; and he gave the residue of his personal estate to his said nephew, and to his niece, to take as tenants in common.

This baronetcy was an old title in tail male.

The testator died in 1799, and Sir Gilbert, the tenant for life, died in 1808, without leaving issue, but he left two cousins, Sir James Afflick, and Sir R. Afflick, who were brothers. Sir James succeeded to the title on the death of Sir Gilbert, and died in Au-

gust 1833, and was succeeded by Sir R. Afflick; the trust property had always been in the hands of the trustees.

MASTER OF THE ROLLS.—Is it stated whether Sir Gilbert had any sons?

Counsel.—It is admitted on all hands that he had no son, Sir James having succeeded to the title.

MASTER OF THE ROLLS.—Sir James took under the words of the will, which gave the interest to the person on whom the title of baronet should devolve.

Mr. Kindersley contended that the gift of the income was the gift of the property itself absolutely, as in the common case of a gift to a *feme covert*. *Page* v. *Leapenwell*; *Haig* v. *Swiney*, and *Elton* v. *Sheppard*.

He further contended, that had the title descended on a great grand-nephew, who might have been the person pointed out in the general description in the will, he could not have taken an account of the rules against perpetuity. Sir James, who took under that description, might have been similarly situated, and it would thus have defeated the testator's intention. It was therefore contended, that he would have taken an estate tail in lands, and an absolute interest in personalty. *Mortimer* v. *West*; *Lord Deerhurst* v. *Duke of St. Albans*.

The MASTER OF THE ROLLS, in giving judgment, and after having read the will, said, in putting a construction on this will, you must look to the events which might have happened, and the intention expressed in the will; if it is to be held to give an estate for life, it must of necessity, in some events, defeat the general intention of the testator, supposing the title of baronet to have devolved on any person beyond the limits laid down against perpetuity; it must therefore, to carry the general intention of the testator into execution, give an estate tail, or a *quasi* estate tail, which in personalty gives the absolute interest. Sir James, therefore, was entitled to this property absolutely.

Counsel.—Mr. Kindersley, Mr. Richards.

Cases cited.—*Page* v. *Leapenwell*, 18 Ves. 467; *Haig* v. *Swiney*, 1 Sim. & S. 487; *Elton* v. *Sheppard*, 1 Brown, C. C. 532; *Mortimer* v. *West*, 2 Sim. 274; *Lord Deerhurst* v. *Duke of St. Albans*, 5 Mad. 232, reversed in the House of Lords.

MARCH 6, 1836.

DONOVAN *v.* NEEDHAM.

Will, Construction of—Maintenance Clause.

Mr. Donovan, by his will, devised his mansion-house in Sussex to the use of his wife for life, remainder to his son, G. Donovan, in tail, with remainders over. And the testator gave and bequeathed to his son, G. Donovan, £20,000, 3 per Cent. Consols, to be paid to him on his attaining the age of twenty-one years; and in

case his son, G. Donovan, should die before he attained his age of twenty-one years, he gave and bequeathed the said sum of £20,000 to his, the testator's, eldest son living at the time of his death. And he declared, that the whole of the residue of his estate, after payment of £2000 to his wife, and the said sum of £20,000 to his son, should go to trustees, to be converted into money, and the produce thereof to be in trust for his wife for life, and, after her decease, in trust for his younger children, born at the time of his death, or in due time after, equally to be divided between them, the sons to take at twenty-one, and the daughters at that age or marriage. And there was a general direction, that the trustees should, out of the said residue, during the minorities of his children, pay and advance such sums for their maintenance and clothing, and also for placing them out to a profession or business, as they, the trustees, should in their discretion think necessary.

And the testator willed, that such sons taking the bequest of £20,000 should not take any part of the residue, except such son happened to be an only child.

The testator made a codicil, dated November, 1830, whereby, after reciting his wife's death, he gave certain other benefits to his children; and, in November, 1832, he made another codicil, whereby he gave to his son, G. Donovan, the further legacy of £15,000, to be paid at such time, manner, and form, as, by his will, was expressed of the sum of £20,000.

The testator died on the 10th of December, 1832. On his death, the bill was filed by the younger children against the executors and G. Donovan for establishing the will, and praying, amongst other things, that it might be referred to the Master to ascertain what ought to be allowed for the maintenance of the children.

The Master reported that £300 a-year was necessary at that time for the maintenance of G. Donovan, but that more would be required on his going to college.

It is to be observed, that a settlement was executed on the marriage of Mr. and Mrs. Donovan, under which the children took a provision.

A question under the words of the will now arose,—out of what fund the maintenance of G. Donovan was to come, his maintenance not having been specially provided for?

It was contended, that where a legacy is given to a person, payable at twenty-one, and no maintenance provided, interest would not be allowed on the legacy, except where that person is the child of the testator, in which case interest would be allowed.

The question, therefore, was, whether the testator had provided a maintenance for G. Donovan? and, if not, whether interest would be allowed; and supposing he died under twenty-one, whether his representatives would be entitled to that interest?

The Master of the Rolls, after stating the case, said, that

where the testator directed that the trustees should, during the minorities of the children, advance such sums of money out of the residue for their maintenance and advancement, he intended that the eldest son should be maintained and advanced as well as the other children, which maintenance was to be provided out of the residue; and that the interest on the two legacies of £20,000 and £15,000 given to G. Donovan, should form part of such residue till he attained twenty-one, and that he should be provided for out of the whole of this fund, and this though he had other property provided for him.

Counsel.—Mr. Pemberton, Mr. Kindersley, Mr. Roupell, Mr. Duckworth.

VICE-CHANCELLOR'S COURT, March 11.

Earl of Shrewsbury *v.* Cottingham.

Mining Lease, Construction of.

This cause has not been finally decided. One of the objects, however, in the bill, was to obtain an injunction to prevent the defendant, (a lessee under a mining lease granted by the plaintiff,) from obtaining coal by means of a shaft or pit sunk upon the private lands of the defendant, instead of upon the demised lands.

It was argued, that this act of the defendant was contrary to the covenants in the lease, which were such as are generally contained in mining leases, and more particularly as the engines and implements were to be given back to the landlord at the expiration of the lease, which could not be done in case the pit was sunk on other than the plaintiff's land. The case of *Templeton* v. *Ward*, which has been lately decided, was cited in support of this argument, where an injunction had been obtained to restrain the defendant in that suit from making a pit to which the plaintiff could not gain access except by crossing another person's land, in doing which he must have committed a trespass.

It was contended for the defendant, that there was no improper motive in sinking a shaft in the adjoining land, it having been done merely because it was impossible to obtain coal from any part of the demised lands, owing to quantities of red rock, and owing to the river, which, at high tide, rendered it dangerous for the men to work at the old pit. It was also urged, that, though the coal had been obtained by means of this new pit for some years, the plaintiff had never interfered until lately.

The Vice-Chancellor, was of opinion, that the evidence had failed to prove that the mines had been improperly worked and that the Court could not (under the circumstances,) direct all the covenants of the lease to be specifically performed.

Counsel for the plaintiff.—Mr. Knight and Mr. Temple.

Counsel for the defendant.—Mr. Jacob and Mr. Sharpe.

MARCH 19, 1836.

LLOYD *v.* LLOYD.

Marriage Articles—Failing as to one Party good against the other.

This was a bill filed for the specific performance of marriage articles.

In 1777, certain articles were executed previous to the marriage of Evan Lloyd the younger with Esther Stephens. After reciting, (amongst other things,) that Evan Lloyd the elder, the father of Evan Lloyd the younger, agreed, in case the marriage should be solemnized, to settle a certain estate, called Tynpwlly and Bryn Mawr, in Carmarthenshire, in manner therein-after mentioned; and James Stephens, the father of Esther Stephens, also agreed to settle a portion of an estate called Glandead, in Pembrokeshire, when Esther Stephens should attain the age of twenty-one. It was witnessed that Evan Lloyd the elder, for himself and wife, covenanted, that, in case the marriage took effect, and James Stephens conveyed his moiety of the estate in Pembrokeshire, that then he, Evan Lloyd, and his wife, when Esther Stephens should come of age, would, at the request, costs, and charges of James Stephens, convey his estates in Carmarthenshire to trustees, upon certain trusts declared in the articles.

And it was further witnessed, that James Stephens covenanted for himself and Mary his wife, that if the marriage should take effect, and Evan Lloyd the elder perform his covenants therein-before contained, he, James Stephens, and his wife, and all necessary parties, would, as soon as Esther Stephens attained the age of twenty-one, at the costs and at the request of Evan Lloyd and Esther Stephens, convey his moiety of the estates in Pembrokeshire to the trustees upon certain trusts therein mentioned. There was also inserted a covenant for quiet enjoyment, and for further assurance, on the parts of Lloyd and Stephens.

Esther Stephens was not made a party to this settlement.

It appeared that James Stephens had mortgaged his estate in Pembrokeshire to the Rev. G. Harris, to secure a sum of money which James Stephens never paid; and Mr. Harris had foreclosed the equity of redemption. Consequently, Stephens was unable to perform his part of the contract.

The legal estate was in Rebecca Lloyd, who took by devise from the eldest son of the marriage, who died without issue, and who was the heir of Evan Lloyd the elder.

The bill was filed by the second son of the marriage, who, on the death of his brother, had become tenant in tail under the articles, against Rebecca Lloyd, for the purpose of getting in the legal estate.

It was contended for the plaintiff, that, according to the intentions of the parties, the covenants were distinct, and that, though

a contract failed as to one party, and could not be enforced against the other, yet it was different as to marriage articles, for the interest of the children could not be affected. *Harvy* v. *Ashley*, *Perkins* v. *Thornton*, *Crofton* v. *Ormsby*.

On the other hand, it was contended, that, according to the express words of the agreement, the performance of one covenant depended upon the performance of the other.

The VICE-CHANCELLOR thought the principal question was, what was the fair intention of the parties in entering into those articles. He agreed with Mr. Jacob, that if it had been plainly manifest, on the face of the agreement, that one covenant should only be carried into effect by the performance of the other, the Court could not decree a specific performance of one unless the other was executed also. But did the parties express that to be their intention plainly and substantially? In order to decide that point, it was necessary to look to the plain meaning of the language they had employed. His Honour here read the articles, and said that the plain consequence which arose from the wording of them was, that Stephens covenanted to do an act in the event of an act being previously done by Lloyd, which act by Lloyd was to be preceded by the act of Stephens, so that he was covenanting to do that which he had already done. That was literally the meaning of the covenants, and it was ridiculous to suppose that they intended any thing so absurd. His Honour said, considering the informality of the articles of agreement, that he was clearly of opinion, that the true intentions of the parties were, that each of them should settle their estates independently on the marriage taking effect; and he therefore must decree the plaintiff entitled to have the settlement of the estates made in the manner prayed by the bill.

In the course of the argument, the Vice-Chancellor said, there was nothing more common than for two fathers, on the marriage of their children, to execute two bonds to secure sums of money payable on their respective deceases; and if one of them became a bankrupt, would it not be very hard if that circumstance rendered the bond of the other party void?

Counsel for the plaintiffs.—Mr. Knight, Mr. Wilbraham, and Mr. Girdlestone, Jun.

Counsel for the defendants.—Mr. Jacob, Mr. Blake.

Cases cited.—*Harvy* v. *Ashley*, 3 Atk. 610; *Perkins* v. *Thornton*, Ambl. 502; *Crofton* v. *Ormsby*, 2 Scho. & Lef. 602; *Eastwood* v. *Vinke*, 2 P. W. 617.

ROLLS' COURT.—March 8, 1836.

Axe *v.* Marris.

Feme Covert—Appointment to her Husband.

A testator, by his will, dated 1828, gave his real and personal estate to trustees, in trust, to sell the same, and the produce thereof, he directed, after payment of his debts and legacies, to be divided into fourteen parts, which were to be divided between his children; and as to the share of Mary Axe, (who was one of the children,) the trustees were to invest the same in Government or real securities, in their names, and to alter, vary, and transpose the same as occasion might require, and should pay the interest, dividends, and annual produce, when the same should become payable, to the plaintiff Mary Axe, during the term of her natural life, for her sole and separate use and benefit, without being subject to the control or intermeddlings of her husband, and her receipts alone should be sufficient discharges for the same; and from and after her decease the trustees were to stand possessed of the same stocks, funds, and securities, and the interest and produce thereof, upon trust, to pay and transfer the same as the plaintiff, Mary Axe, should, by deed or will, direct or appoint, and in default of such direction or appointment, to her children.

There was no settlement made on her marriage. She executed her power of appointment by a deed dated the 26th of November last, which deed, after reciting the will, and that, for the better enabling her husband to maintain and educate her family, she directed and appointed, gave, assigned, and made over to G. Axe, her husband, all that the sum of £450, (being the fourteenth part given by the will,) for the use and benefit of her said husband.

There was no assignment of her life interest. This bill was filed, stating the will and the appointment, and praying a transfer of the stock to the husband.

The question was, whether the appointment took effect after the death of the wife or immediately, and whether the wife took an absolute interest under the will. The trustees were ready to act as the Court should direct, but were unwilling to transfer without that authority, as their duty was to protect the infants.

It was contended, that all the cases in which such a clause gave the absolute interest, were applicable to the case of a feme sole: there was not such a case applicable to a feme covert. *Barton* v. *Briscoe*, and *Lynn* v. *Ashton*.

His Lordship observed, that the latter case differed from this, in there having been an assignment of the life interest, but it was the same in other respects. It was an appointment of the capital, and an assignment of the life estate.

MARCH 15.

The MASTER OF THE ROLLS, in giving judgment, after stating the case, said, as the appointment was to take effect after the decease of the wife, the deeds of appointment would give the property to the husband after the death of the wife. It was first left to her sole and separate use for life. This life estate was not assigned by the deed exercising the power: the trustees were, therefore, to hold the property, in trust for the wife during her life, for her separate use. On her death it belonged to her husband. His Lordship said he could not make a decree directing the trustees to transfer to the husband: the bill, in the present state, could not be sustained; he, therefore, could not order the fund to be taken out of their hands.

Mem.—We understood that the parties intended executing another deed, assigning the life interest.

Counsel.—Mr. Whitmarsh and others.

Cases cited.—*Anderson* v. *Dawson*, 15 Ves. 582; *Reid* v. *Shergold*, 10 Ves. 370; *Bradley* v. *Westcott*, 13 Ves. 445; *Barton* v. *Briscoe*, 1 Jac. 603; Jacob's ed. of Roper's Hus. and Wife, 200; *Lynn* v. *Ashton*, 1 Russ. & M. 188; *Woodmeston* v. *Walker*, 2 Russ. & M. 197.

MARCH 12.

CHARLTON *v.* SADEN.

Reference to the Master to take an Account. Whether he can allow for Maintenance.

The following question came before the Court, on exceptions to the Master's report:—

A. Charlton, by his will, dated the 9th of March, 1822, bequeathed all the residue of his personal estate to his trustees, in trust to divide the same amongst his four children, share and share alike, to take on their attaining the age of twenty-one years, and the share of such of them as should be under that age at the time of the testator's decease, to be invested in the funds, and that his trustees should pay the interest, dividends, and produce thereof, for the maintenance of such children, in such manner as they, the said trustees, should think fit, and the surplus interest, dividends, and produce, to be invested for the purpose of accumulation; and the trustees were also empowered to advance a portion of the principal, for the benefit of the children, as they, the trustees, should think fit.

The bill was filed, praying that it might be referred to the Master, to take an account of the personal estate of the testator.

A decree was made in May, 1832, directing the usual reference to the Master to take an account of the testator's estate.

The Master made two reports, whereby he reported (amongst other things,) that he had allowed certain sums of money, which the executors had applied for the maintenance of the children.

The question was, whether, under the words "all just allowances," in the decree, the Master could make such allowances for the maintenance of the children, there being no other authority in the decree for that purpose.

The MASTER OF THE ROLLS, in addressing Mr. Tinney, asked if he knew of any case to warrant him, the Master of the Rolls, in allowing such an account under the words in the decree.

Mr. Tinney said he could not find any case; but he contended that, under the words "all just allowances," the Master could take that account, especially as the testator had empowered the trustees to apply the interest for maintenance, and also a part of the principal for advancement; and it was further contended, that the Master could not ascertain the balance of the testator's estate, without taking into the account what had been laid out for the maintenance.

The MASTER OF THE ROLLS, in giving judgment, said he did not mean to express an opinion whether the money had been unfairly laid out or not. The only question he had to consider was, whether the exceptions to the Master's report were rightly taken. The bill was filed for an account of the testator's estate. It stated the will of A. Charlton, in which he directed the executors to maintain and advance the children. The bill further stated, that there had been certain sums of money applied for their maintenance. The cause came on for hearing: a decree was made, referring it to the Master to ascertain the clear residue of the testator's estate; but there was no direction as to the maintenance. The executors having applied certain sums for maintenance, the Master allowed such sums. The executors had wholly neglected to make any application to the Court, or to obtain any direction as to the maintenance; and the Master had allowed these sums to a considerable amount, without any authority. Have not the parties a right to satisfy themselves that the maintenance was reasonable and proper?

The reference was not to ascertain what ought to have been allowed for maintenance; and the Master having done so, the question was, whether it ought to have been allowed. His Lordship thought that the act of the Master was clearly premature, and the allowances made by him without authority. The executors had taken upon themselves to perform that which, at the proper period, they ought to have applied to the Court, and obtained a reference as to what maintenance was right and proper. They had taken on themselves that risk. The question then was, whether, under these circumstances, the exceptions ought to be allowed. His Lordship was of opinion, that the Master ought not to have allowed that account, and these exceptions must be allowed.

Counsel.—Mr. Tinney, Mr. Beames, Mr. Roupell, Mr. Goodeve, Mr. Barker.

MARCH 16.

HARGREAVES *v.* ROTHWELL.

A Solicitor employed by two Mortgagees, fixes the second Mortgagee with Notice of the first Mortgage.

A testator directed certain property to be divided amongst his children, one of whom was Mrs. Nuttall, and the executors were empowered to place out such shares, on good security, to the separate use of his married daughters.

The executors, it appears, had lent money, at different times, to the husbands of the daughters; amongst the rest to Mrs. Nuttall's husband; and in October, 1827, they took a security on certain property for £1500, which security was the first of three mortgages of the same property. A solicitor named Woodcock was employed in this transaction, for both the mortgagor and the mortgagees.

In April or June, 1821, a partnership was formed between Nuttall and Kay, on which occasion it was agreed that Kay should bring into the partnership the sum of £5000; but, as he did not possess that sum, he applied to Hargreaves, the plaintiffs, to advance it, and Kay procured Nuttall to give Hargreaves a mortgage for £2000, which he did, on the same property which he had mortgaged to the executors.

In this transaction Mr. Woodcock was again employed as the solicitor of the mortgagor and mortgagees. The former mortgage was recited in this mortgage, but the plaintiffs, the second mortgagees, did not, according to the usual practice, inform the first mortgagees of his mortgage.

In November, 1830, the executors of the will took a second mortgage from Nuttall for £2200 more, money advanced. In the last transaction, Mr. Woodcock was again employed by both parties.

The question was, whether, as Mr. Woodcock, having been employed in all the transactions, the notice to him was notice to the executors of the transaction with Hargreaves.

It was urged, that if the executors had had notice of the second mortgage, they would have taken a better security.

Woodcock, at the time of the last mortgage, did not give the executors notice of the second mortgage. He admitted, however, that he had had that mortgage in his recollection at the time he was employed in the last transaction, but that he considered it as Kay's debt, and that there was no occasion to mention it.

It was contended that where a party chooses to employ a solicitor who had been concerned for the other party, he was affected with any notice which his solicitor might have; in support of which, the following cases were cited:—*Brotherton* v. *Hall*, *Le Neve* v. *Le Neve*, *Tunstall* v. *Trappes*.

On the other hand it was contended that, in order to constitute

notice, the solicitor having the notice must have been employed in the same transaction, not in a transaction foreign to the business in hand. *Lowther* v. *Carlton*, *Warwick* v. *Warwick*, *Stedd* v. *Whitaker*, *Shern* v. *Mill*, *Mountford* v. *Scott*, *Hamilton* v. *Royse*, and Sugden's last edition of Vendors and Purchasers.

THE MASTER OF THE ROLLS said, in giving his opinion he must consider the case of *Mountford* v. *Scott*, which appeared to be the case most relied upon, and in giving his opinion he begged to be considered as not deciding contrary to the cases already decided.

His Lordship said that the marginal note in *Mountford* v. *Scott* mislead the reader as to the real case, as it differed from the judgment expressed in the body of the report; the case is reported in 3 Mad. 34; the marginal note stands thus: "Notice to an agent, in order to bind his principal, must be in the same transaction; and this though the agent acted as the attorney for the vendor and vendee." The judgment in that case, however, is very different, it stands thus:—

"The plaintiff has a lien against every one claiming under Scott with notice of the deposits. Scott made the underlease to Blake, because he could not produce the lease to him. Blake was made the instrument of a fraud upon the plaintiff; he assigns his underlease to Warren, who, it is urged, had constructive notice of the deposit with the plaintiff; as the underlease states the original lease to Scott, from Stapp; and that put Warner under the necessity of inquiring as to the original lease, which inquiry would have led him to a knowledge of the deposit with the plaintiff; and neglecting to make the inquiry, he must suffer by his negligence. But I think it was not Warner's duty to inquire what had become of the original lease, and that there is no imputation upon him for not inquiring; such an inquiry is not usual in transactions of this nature. But then it is said that Gyles prepared the underlease to Blake, and that he was employed to prepare the assignment from Blake to Warner, and that when he so prepared such assignment, he knew of the deposit with the plaintiff, and it was his duty to communicate his knowledge to Warner, and that Warner was bound by his knowledge. No authority is produced to that extent. The agent stands in place of the principal; and notice, therefore, to the agent is notice to the principal; but he cannot stand in the place of the principal, until the relation of principal and agent is constituted: and as to all the information which he had previously acquired, the principal is a mere stranger. The bill must be dismissed."

The case came afterwards before Lord Eldon, on appeal, reported in Turner & R. 279, in which it was considered as a deposit of deeds for the benefit of creditors, for a debt secured by deposit. Lord Eldon said, that "the Vice-Chancellor, in this case, appears to have proceeded upon the notion, that notice to a man in one transaction is not to be taken as notice to him in another

transaction. In that view of the case, it might fall to be considered, whether one transaction might not follow so close upon the other as to render it impossible to give a man credit for having forgotten it. I should be unwilling to go so far as to say, that, if an attorney has notice of a transaction in the morning, he shall be held in a court of equity to have forgotten it in the evening. It must, in all cases, depend on the circumstances."

His Lordship said, it was contended, that that case was the only one applicable to the present case; but it did not appear that, in that case, the solicitor had the previous transaction in his mind at the time of the second transaction. In that view of the case it is clearly not applicable to the present case. His Lordship was, therefore, clearly of opinion, that the mortgage to the plaintiffs had priority to the second mortgage to the executors.

Counsel.—Mr. Pemberton, Mr. Kindersley, Mr. Walker, and others.

Cases cited.—*Warrick* v. *Warrick*, 2 Atk. 294; *Stedd* v. *Whitaker*, Barnard. 220; *Hiern* v. *Mill*, 13 Ves. 121; *Mountford* v. *Scott*, 3 Mad. 34; *Hamilton* v. *Royse*, 2 Scho. & Lef. 327; the last ed. of Sugden's V. & P.; *Lowther* v. *Carlton*, 2 Atk. 242; *Brotherton* v. *Hatt*, 2 Vern. 574; *Le Neve* v. *Le Neve*, 3 Atk. 646; *Tunstall* v. *Trappes*, 3 Sim. 286.

LORD CHANCELLOR'S COURT, March 11.

Manly *v.* Saint.

Practice—Enlarging Publication.

After an undertaking to speed, by which the plaintiff was bound to pass publication in Hilary Term, 1836, and to set down his cause in Easter Term following, the plaintiff applied, by motion, to the Vice Chancellor, on the last day of Hilary Term, for an order to enlarge publication till the first day of Easter Term, and for a commission to examine witnesses. On the motion being made, it was admitted, that the application to enlarge publication ought, under the terms of the orders of the Court, to be made before one of the masters; and the plaintiff's motion having been for a commission as well as to enlarge publication, he was allowed to save his notice of motion till the second seal after term, (that is to say,) until the question as to publication was decided. The affidavit filed in support of the motion to enlarge publication, made by the solicitor of the plaintiff, alleged illness on the part of the solicitor, and great distress of mind occasioned by the death of a near relation, which prevented his attending to business.

The Master, though he admitted that this affidavit, filed in support of the motion, did not make out a sufficient case to warrant the application, decided on enlarging publication, on the ground,

that if the defendant would consent to having the cause set down in the same term in which publication passed, he would not suffer any delay; and upon the defendant refusing to bind himself by any terms, declined making any order as to costs.

From this order the defendant appealed.

The Lord Chancellor, after stating that the case was one in which the defendant could not suffer from the delay, he should allow the plaintiff to enlarge publication, but, upon terms, directed the counsel for the defendant to state what terms he required.

And on the following morning, it was ordered, by arrangement between the counsel of the parties, that the plaintiff should be allowed to enlarge publication till the end of Easter Term, and have his commission to examine witnesses, upon payment of the costs of the motion before the Vice-Chancellor, and the costs of the application to the Master: the costs of the appeal to be costs in the cause.

Counsel.—Mr. Wigram, Mr. Jacob, Mr. Knight, Mr. Hethrington, Mr. Webster.

Cases cited.—*Whitelocke* v. *Baker*, 13 Ves. 512; *Hewes* v. *Hewes*, 4 Sim. 1.

ROLLS' COURT.—March 7, 1836.

Verrehelд *v.* Paul.

Plea—Form and Substance.

This was a plea to a bill for redemption.

The bill stated a will made in 1812, whereby the testator, after reciting that he was seised of certain plantations in the island of St. Kitts, and after giving as therein mentioned, he gave and devised to his trustees, and the survivor of them, all his plantations, lands, and hereditaments, negroes and their issue, and all other his real estate, and the residue of his personal estate, in trust to sell and lay out the monies to arise by such sale, in trust for the three children, and other the issue of his daughter, upon certain trusts therein declared, and he appointed the trustees his executors.

The testator made a codicil, dated October, 1818, whereby he appointed three other persons executors, one of whom was the defendant. The testator died in October, 1818.

The trustees and executors named in the will did not prove the will, nor did they in any way act in the execution of the trusts of the will; but the executors named in the codicil proved the will and codicil in the island.

The infant legatees (who were the plaintiffs,) all attained the age of twenty-one years.

The bill further stated, that in 1817, the testator borrowed

£2000, and that the defendants advanced that sum, on the security of a mortgage on the plantation.

The plaintiffs knew nothing of the mortgage, but depended on the discovery to be made by the answer of the defendants.

The bill charged, that by receipt of the rents and profits, soon after the decease of the mortgagor, the debts had been paid, as it would appear, if the accounts of the defendants, in respect of the receipts from the plantation, were produced.

The bill further charged, that the defendants had no interest in the plantation, except as mortgagees.

To this bill the defendants put in a plea, stating a bond by which the testator became bound to one of the defendants, and that an action had been brought on the bond by the obligee, and judgment obtained against the executors named in the codicil, in the Court of King's Bench of the island of St. Kitts; and on the 14th August, 1821, execution was levied of the lands and chattels of the testator, in satisfaction of the debt and the costs of suit. That on the 24th of September, 1821, the plantation was put up for sale, pursuant to the directions of the act made in the island; and the defendants bid at such sale, and became the purchasers of the same. After the sale, the surplus, after payment of the debt and the costs, was handed over to the provost marshal, on which occasion he executed a bill of sale of the plantation and slaves to the defendant.

The plea averred, that the said levy and sale were made according to the laws of the said island, under the said judgment, and that, by the bill of sale, all the right, title, and interest of the testator were, according to law, assigned and vested in the defendants.

There was no averment that the lands were in the possession of the executors at the time of the sale.

There was also an averment according to one of the defendant's belief, and for greater certainty he referred to the bill of sale.

The plea also stated, that, soon after the testator's death, the executors named in the codicil were in possession and in the receipt of the rents and profits, and that the defendants entered into possession of the plantation after, and not before, the sale.

The plea was entirely silent as to the mortgage.

The question was, whether such a plea was right in form and substance?

It was contended, that the defendants ought to have discovered the mortgage; and that inasmuch as that they had pleaded the bill of sale in bar, they ought to have shown what was the law of the island; for it was a rule, wherever you referred to a foreign law, you must allege what that law is. They only alleged that they had done certain acts according to that law.

The Master of the Rolls.—In the discussion of a plea you don't go into evidence.

It was further contended, that the averments of the defendant must be positive; he could not set forth as to his belief, because he was interested; but that a party was at liberty to do so where he was not interested.—*Drew* v. *Drew.*

MASTER OF THE ROLLS.—How, then, would you plead in cases where facts are not within the immediate knowledge of the defendant, for the plea as well as the answer is on oath?

It was further contended, that the plea was bad in point of form. It stated, that, soon after the testator's death, the executors were in possession. It also stated, that the defendants entered into possession after the sale.

It was contended, that this was bad, because it tendered two issues; it gave a discovery sought in the bill; and the rule of court is, if you put in a plea, you cannot give a discovery to destroy the plea. That if they did make a discovery at all, they ought to have stated whether they had been in possession before the sale, as they might have been in possession in the interval between the time of the testator's death and the action brought; they ought to have answered as to the possession, for, in that case, they would have had to account as mortgagees in possession.

The MASTER OF THE ROLLS said he had no doubt the form and substance of the plea were right, and that the plaintiffs had no right to redeem. The defendants had put in a plea to part, and an answer as to the other. The only question was, whether it was requisite to make the defendants make out a title between the time of the testator's death and the sale. His Lordship was of opinion, that that was unnecessary.

The defendants claimed under a right different from that mentioned in the bill.

His Lordship allowed the defendants to amend their bill.

Counsel for the plaintiffs.—Mr. Kindersley, Mr. Cole.

Counsel for the defendants.—Mr. Pemberton, Mr. Garratt.

Cases cited.—*Drew* v. *Drew*, 2 V. & B. 159; *Robertson* v. *Lubbock*, 4 Sim. 161.

MARCH 28, 1836.

BARNETT *v.* GRAFTON.

Practice—31*st Order of* 1828—*Costs*—*Setting down plea.*

This was a question as to costs under the 31st order of the 2nd of April, 1828. The plea, (which was admitted to be a proper plea,) was filed on the 26th of February; the order for setting it down was obtained on the 21st of March, and it was put in the paper on the 25th of March, and the replication was filed on the same day that the plea was put in the paper.

Mr. Pemberton, having mentioned that the replication had been filed, applied for the costs. The Master of the Rolls ordered it to stand over to the following day, which was the 28th, when Mr. Pemberton and Mr. Piggott again applied for costs. They contended, that, under the 31st order, the plaintiff ought to pay the

taxed costs of the suit, and cited *Jones* v. *Wattier*; and that the defendants had been put to the expense of appearing.

Mr. Webster, for the plaintiff, contended, that, by the latter part of the order, the costs ought to be reserved. He further contended. that, by an old order made by Lord Clarendon, mentioned in Beames's Orders, 173, and in 2 Mad. Cha. Pr. 295, the defendant ought to have set down the plea within eight days.

The MASTER OF THE ROLLS, having consulted the Registrar, said, that the order of Lord Clarendon, had now become obsolete, and that, as the plaintiff had had a long time to reply, he ought to pay the taxed costs.

Counsel for the plaintiff.—Mr. Webster.

Counsel for the defendant.—Mr. Pemberton, Mr. Piggott.

Authorities cited.—2 Mad. Ch. Pr. 295; Beames's Or. 173; *Jones* v. *Wattier*, 4 Sim. 128.

MARCH 19, 1836.

KILLICK *v.* NEWMAN.

Will, Construction of—Profits of Trade.

This was a bill filed in 1834 by the children of Samuel Philip Killick, late of Mitcham, Surrey, (after they had attained the age of twenty-one,) against his widow and her second husband. The object of the suit was to have the will established, and to have an account of the profits of trade. The will, which bore date the 6th of November, 1809, was to the following effect:

First, the testator willed and directed, that all his just debts, funeral and testamentary charges, should be paid; and he appointed his father in law, Richard Arthur, and his wife, Bridget Killick, to be executor and executrix of his will.

He gave and bequeathed unto the said Richard Arthur, the sum of £10. *He gave and bequeathed* unto his said wife all his household furniture, plate, linen, china, and every other article in the house, for her own separate use; and also all bonds, bills, monies, and securities, and all his stock, profits in trade, implements and utensils in trade, together with all leaseholds and personal effects whatsoever and wheresoever. He gave and bequeathed unto his executor and executrix, or the survivor of them, towards the bringing up his children, and placing out for their advantage any monies that might or could be spared out of trade, for the benefit of his children, and the survivors of them, till the youngest child arrived at the age of twenty-one years, and then it was his will, and he directed, that what property might, at that time, remain in the hands of his said executor and executrix, or the survivor of them, if any property be by them laid out in government securities, that the whole of such securities, and all other property arising from the profits of his trade or otherwise, be equally divided between his surviving children and his said wife.

The testator (who was a physic gardener,) died the 22nd August, 1810, and left three children, of the respective ages of six, four, and one.

Mrs. Killick, in October, 1816, married to the defendant Newman.

The children were maintained by Mrs. Newman till her second marriage, and afterwards by herself and husband.

It appeared that the testator, before his death, had incurred heavy expenses, on account of his long illness, and on account of a law suit; and, on his death, did not leave sufficient to pay the whole of his debts, or to carry on his business.

Mrs. Newman, after the testator's death, paid off his debts so far as the assets went, and, with the assistance of her friends, paid off the remainder, and was enabled to carry on the business of her late husband, out of which she supported herself and children. She continued, part of the time, to cultivate the land occupied by her husband, as well as employed the same workmen: she also took other lands.

The question was, what interest the wife and children respectively took in the business.

It was contended, that Mr. and Mrs. Newman carried on the trade as trustees for herself and children.

On the other hand, it was contended, that every thing was given to the wife, except what might be spared out of the trade; and that even supposing that not to be the construction of the will, yet, as she had borrowed money for the purpose of paying the testator's debts, and also for carrying on the business, which otherwise must have been discontinued, she had obtained a right, as a purchaser, to the trade, exclusively of the children, and that, at law, the widow might have pleaded *plene administravit*. *Chalmer* v. *Bradley*.

In answer to which, it was contended, that Mr. and Mrs. Newman could not have become purchasers of the trade, which was trust property.

The Master of the Rolls said, the difficulty occurred in the wording of the will. It appeared that the testator had had great confidence in his wife, and he gave her the whole management of the business. It was contended, that that business would have been at an end, had not the wife borrowed money for the purpose of carrying on the trade. His Lordship, however, said, that the good-will must be considered as property; and in construing the will, the clauses must be read thus:—I give and bequeath unto my said wife, all my household furniture, &c. for her own separate use. This clause must be read distinct from the following clause in the will, which his Lordship said must be considered as one bequest, which would make the will consistent. The bonds, bills, monies, &c. given to his executor and executrix, were to be employed in carrying on the trade, and the wife and children were to

be maintained out of it; and the testator relied on his wife to do this. The property which was maintaining the children during their minorities, could be considered as what the testator meant by the monies that might or could be spared out of trade; and though the testator did not leave sufficient to pay his debts, and not enough to enable a person to carry on the trade, still he left her the good-will, and with that she prevailed on the creditors to be indulgent, and obtained money from her friends. She employed the same land and the same workmen as the testator; and, in fact, carried on the same business, for the benefit of herself and children, till the youngest child attained the age of twenty-one years; and the income of the property was thus properly employed. At that period the testator had directed how the property should go. Here his Lordship read the words of the will, and said, under those words, what property remained at that period, would be the property of the wife and children. The question was, what could be the best mode of inquiry how that could be done?

His Lordship afterwards said, that it must be considered that all the profits were absorbed for the maintenance of the wife and children, till the youngest attained twenty-one; and that there must be an inquiry as to what was the state of the trade at the time of the testator's death, and at the time the youngest child attained twenty-one; and in taking the account, the lands which the wife afterwards took were not to be considered as her capital. And to inquire what capital the widow had brought in, for which she was to have credit. And the children were to have credit for whatever surplus the widow had invested in the trade.

Counsel.—Mr. Boteler, Mr. Treslove, Mr. Roupell, and Mr. Teed.

Cases cited.—*Chalmer* v. *Bradley*, 1 Jac. & Walker, 51—64; *Wynn* v. *Hawkins*, 1 Brown, 179.

VICE-CHANCELLOR'S COURT.—March 3.

Mark *v.* Locke.

Demurrer—Customary Heir—Special Custom.

This was a demurrer to a bill for want of equity. The facts stated in the bill were these;—In April, 1769, marriage articles were executed, whereby R. Mark, the elder, covenanted to surrender certain copyholds to trustees, upon trusts therein mentioned. There was a clause, that in case of default of issue living at the time of the decease of the survivor of the husband and wife, then upon trust that the said trustees should surrender the said copyholds to the customary heir of R. Mark the elder. The bill further stated, that by the custom of the manor, if a tenant died, leaving a widow, she was the heir, and as such, became entitled to

the lands. If the tenant died, leaving no wife, the youngest or only son was the heir; and in case there was no youngest or only son, then the youngest or only daughter was heir; and in case there was no youngest or only daughter, then the youngest or only brother; and in case there was no youngest or only brother, then the youngest or only sister.

The bill further stated, that the marriage took place, and the surrenders were made, and that R. Mark the elder died in 1779, leaving Grace Mark, his widow, and Elizabeth Mark, his child, him surviving. The widow afterwards married a person named Turner; Elizabeth died in 1812, and the widow died in 1819. The bill further stated the pedigree of the plaintiff, who claimed through J. Mark, the only brother of the settlor. He, J. Mark, died in 1777, leaving two sons, J. Mark and R. Mark, the latter, (who was the youngest son,) died in 1798, intestate, leaving the plaintiff his youngest son.

The plaintiff is thus the great-nephew of Richard Mark, the settlor, being the youngest son of the youngest son of the only brother of the settlor.

The settlor also left a sister named S. Locke.

The bill stated that there were many instances in the manor of a youngest son of a deceased brother taking in exclusion of a younger sister then living.

There were several persons who claimed to be entitled as the heirs of R. Mark the elder at the death of Grace Turner, and a suit had been instituted, entitled *Lock* v. *Southwold*, for the purpose of ascertaining those rights.

It was contended, that the plaintiff was, at the time of the death of Grace Turner, the customary heir, and was entitled as the person pointed out by the articles.

The Vice-Chancellor, in giving judgment, said that this was an application by means of which the plaintiff was to make out a title. He did not, however, show a sufficient title. It appeared to him, the Vice-Chancellor, to be absolutely necessary for the plaintiff to do more than state the custom. His Honour (having here stated the custom which has been before stated,) observed, that it stopped at the youngest sister; and it did appear to him, that that statement of the special custom could only apply to the case of a youngest son of a youngest or only brother, but it could not be intended to apply to this case, where the plaintiff is the youngest son of a youngest son of an only brother. Besides that, there was only an allegation of a particular custom of the manor; the bill could not be supported, because the particular allegation was not sufficient, it must be made manifest. There is another objection, which is this: it is stated that J. Mark had two sons; of necessity he must have had a wife, and that is not accounted for. Richard Mark also had a son; consequently he must also have had a wife, who was not accounted for. There was another cir-

cumstance in the bill.—The title of the plaintiff is made to depend on the particular construction of the articles, which were, that the person who was entitled was to be the right heir of R. Mark, at the time of the death of Grace Turner. She died in 1819, certainly. It appeared to his Honour somewhat unintelligible how R. Mark, the father of the plaintiff, could have been entitled, for it was said, that he died in September, 1798, intestate as to the said premises. How could you put a true construction on the articles, unless the statement of fact as to the pedigree was plain at law. If R. Mark had been alive, he would have been entitled; but it by no means followed that the plaintiff would be entitled.

As to the special custom, the bill alleged that there were many instances in the manor of a youngest son of a deceased brother taking in exclusion of a younger sister then living, but it did not supply any evidence as to that fact of what the law was. His Honour, therefore, thought that the demurrer ought to be allowed.

Counsel for the plaintiff—Sir W. Horne and Mr. Blake.
Counsel for the defendant.—Mr. Jacob and Mr. Richards.
Cases cited.—*Williams* v. *Steward*, 3 Mer. 472; *Clements* v. *Scudamore*, 1 P. W. 63; *Doe* v. *Sisson*, 12 East, 62; *Doe* v. *Mason*, 3 Wils. 63; *Roe*, d. *Bennett*, v. *Jeffery*, 2 M. & S. 92.

ROLLS' COURT.—March 30, 1836.

Farrow *v.* Vipan.

Mortgage in Trust for Sale—Mortgagee a Trustee—Purchasing the mortgaged Property—Bill praying a Sale not offering to redeem.

Several questions arose out of the following case, the facts of which appeared from the statement of Mr. Kindersley,

Thomas Farrow, the father of the plaintiff, (being seised of the equity of redemption of freehold and copyhold estates, a part of which was in mortgage to a person named Bloomfield for £1000, at 5 per cent., and another part mortgaged to a person named Speechley for £650, at 5 per cent., and being indebted to the defendant, Vipan, in the sum of £600,) executed certain indentures dated the 20th and 21st of May, 1811, by which all the freeholds were conveyed, and the copyholds covenanted to be surrendered, to Vipan, in trust, that he, Vipan, should, as soon as conveniently or at any time, make full sale thereof, free from the equity of redemption, and convey the same to the purchaser; and upon further trust that Vipan should, out of the money to arise by sale, pay the mortgage sum of £1000 and the interest thereof due to Bloomfield, and then to pay the mortgage sum of £650 and interest thereof due to Speechley, and then that Vipan should retain to himself

his debt of £600 and interest, and upon trust to hand over the surplus to Farrow, the mortgagor.

The copyholds were surrendered, and Vipan, out of the rents paid to Farrow, (the father,) up to the time of his death, divers sums of money, on account of the surplus rents to which he was entitled.

An agreement in writing had been entered into between Farrow (the father,) and Vipan, that no sale should take place, and that Vipan would undertake to keep a regular account of the rents and profits of the estates. Farrow, the father, remained in possession till 1815: some attempts were made, during that time, by Farrow, to sell the estates, all of which failed, owing to the money offered for the purchase not being sufficient to pay off the incumbrances.

Speechley, (who was entitled to insist on his mortgage,) brought an ejectment, and got possession of the property comprised in his mortgage, and held the same till he was paid off in 1823.

In 1815, Bloomfield entered into possession of other property, the subject of his mortgage, and continued in possession till 1829, and in 1830 a re-conveyance was made to the defendant, in consideration of £1000, paid to the executors of Bloomfield, who had, in the mean time, died.

Farrow, the father, died in February, 1821, intestate, leaving the plaintiff Farrow his heir at law, upon whom the real estate devolved: he also left three daughters, who became entitled to his personal estate, as next of kin: he also left a widow, who claimed dower out of the estate.

Two of the daughters assigned their interest to the plaintiff Farrow.

The present bill had been filed by Farrow, as heir at law, and as assignee of the two sisters, and by White (who had married the other sister,) against Vipan, praying a sale of the estates in his possession.

It appeared that, in 1819, Speechley brought an action against Farrow (the father,) on a bond, on which occasion an arrangement had been entered into, by which it was agreed that Vipan should pay off Speechley, who was to assign his interest to Vipan. In pursuance of this agreement, the defendant paid to Speechley several sums of money, but in consequence of Speechley's not carrying into effect his part of the agreement, the present defendant filed a bill against him, which was demurred to, by reason of Farrow (the son,) not having been made a party. In the amended bill he was made a party, and, as was alleged, without his authority.

The MASTER OF THE ROLLS said that, as it was a proper suit, and as it appeared to have been for his benefit, there could have been no objection to his having been made a party.

Speechley being then in a weak state of mind, it was agreed to

refer to the late Mr. Perkins, to ascertain whether the suit was for his benefit.

Mr. Perkins made two several awards, and the result was, that Speechley conveyed his securities to the defendant Vipan.

It was contended, for the plaintiff, that Vipan was a trustee, and not a mortgagee, and that, therefore, he could not be considered a purchaser (which he claimed to be,) of the property comprised in the indentures of May, 1811.

It was contended, for the defendant, that he must be considered as a mortgagee, and that the plaintiff could not compel a sale without offering to redeem.

The MASTER OF THE ROLLS decided, that the defendant could not be considered a purchaser for his own benefit; that he must be considered in the mixed character of a trustee and mortgagee, and that the plaintiff could not compel a sale without offering to redeem. That as the mortgagee was then willing to be considered as only entitled to be paid the money that was owing to him, his Lordship directed that it should be referred to the Master, to take an account of what was due to Vipan in respect of his security, and of the interest due to him, and also in respect of the monies which he had laid out for fines and fees of the copyholds, and of other monies, costs, charges, and expenses, which he had paid on behalf of the plaintiff.

Counsel.—Mr. Skirrow for the plaintiff, Mr. Kindersley for the defendant, Mr. Stuart for the widow, and Mr. Parry for another party.

LORD CHANCELLOR'S COURT, MARCH 31, 1836.

Ex parte HALFORD.

Mortgagor's Costs of appearing before the Master under 1 *W. IV. c.* 60.—*Lunatic Mortgagee.*

In this case a petition had been presented by the mortgagor under 1 W. IV. c. 60, to have a reconveyance of an estate which had been mortgaged to a person who had afterwards become lunatic; and the usual reference had been made to the Master.

The mortgagor (who appeared before the Master,) now applied that his costs of appearing might be paid out of the lunatic's real estate.

Mr. Morley, for the mortgagee, contended, that there was not the least necessity for the mortgagor's appearance, and that, consequently, he ought not to be allowed his costs.

The LORD CHANCELLOR, being of the same opinion, ruled accordingly.

Counsel for the mortgagee.—Mr. Morley.

Counsel for the mortgagor.—Mr. Wilcock.

Case cited.—*Ex parte Richards*, 1 Jac. & W. 264.

NOTE.—We presume that, for the same reason, the mortgagor would not be allowed his costs of appearing to confirm the Master's report.

MARCH 31, 1836.

MILWARD *v.* LYSONS.

Contract for re-purchasing an Annuity—Whether Policy of Assurance is included.

This was an appeal to discharge an order of the Vice-Chancellor, by which the defendant, Mrs. Lysons, (who was the representative of Colonel Gardner,) was restrained from proceeding in an action at law to recover the amount of a policy of assurance for £2000 which had been effected on the life of Colonel Gardner. The facts were these:—Mr. Milward had granted a rent-charge, by way of annuity, to Colonel Gardner, and the colonel ensured his life. Afterwards, a contract was entered into between the colonel and Mr. Milward for releasing the annuity for the sum of £3500. The contract was negotiated through the intervention of a Mr. Barrow.

The question was, whether, in this negotiation, it was intended to include the policy of assurance?

His Lordship, in giving judgment, went through the evidence, (which was at great length, consisting of affidavits and letters,) and said, that, though it was unnecessary, in support of an injunction, that the evidence must be quite conclusive, yet it was necessary that it should be *primâ facie;* but, in the present case, there did not appear to have been any expressions which would warrant the supposition that it was intended to include the policy of assurance in the contract. He must, therefore, dissolve the injunction.

Counsel.—Mr. Jacob, Mr. Wigram, Mr. Knight.

BROWN *v.* THORNTON.

Document referred to by Answer—Order to produce at a Trial at Law.

This was a motion on appeal from an order of the Vice-Chancellor, in which he had ordered a document to be read on a trial at common law which had been referred to in an answer to a bill of discovery.

The Lord Chancellor deferred his judgment in order to enable the counsel for the defendant to seek for authorities against discharging the order.

After Mr. Jacob had cited the authorities mentioned below, and made some observations,

His Lordship, in giving judgment, said—The universal proposition was, that where a bill had been filed for a discovery merely, and an answer had been put in, referring to a document, this document was to be considered as part of the answer; and if this answer was produced as evidence in a court of law, a court of equity could

not interfere to compel a defendant to allow a part of the answer to be read without reading the whole. The rule was established at law, that if the answer of a defendant in equity was used by a plaintiff at law, he must read the whole of the answer. His Lordship said he could not give one party an advantage over the other by permitting one part of the answer to be read without reading the whole. In none of the cases to which he had been referred was there an authority which applied to the present case.

The Court had power to compel an answer on a bill of discovery in aid of an action at law, but after that answer was obtained the Court had no further jurisdiction respecting any use that might be made of it in a court of law. The plaintiff has got an answer and the document belonging to it, and the Court can do nothing more. The order for production of the document must be discharged.

Authorities cited by Mr. Jacob.—*Williams* v. *Munnings*, Ryan & M. 18; *Taylor* v. *Sheppard*, 1 Younge & Collyer, 280; *Bland* v. *Wenwright*, in Exchequer, not yet reported; and *Rawley* v. *Perkins*.

ROLLS' COURT.—March 16, 1836.

Esdaile *v.* Kynaston.

Supplemental Bill in England to enforce a Decree in Jamaica.

This was a demurrer, for want of equity, (on the grounds of a suit and decree in Jamaica, and for want of jurisdiction,) to a supplemental bill filed by a mortgagee for an account of what was due in respect of a mortgage sum of £7732 : 19 : 2, and for a foreclosure.

Two plantations in Jamaica, the property of R. J. L. O'Connor and C. O'Connor, called Carrickfoyle and Fernbrook, were subject to certain mortgages for securing £7732 : 19 : 2, and further advances, and to secure £12,000 to R. J. L. O'Connor. A bill had been filed in Jamaica by the mortgagees for an account against C. O'Connor, and for enforcing the securities against the Fernbrook plantation, and for foreclosure and sale thereof.

The plantation was sold under a decree, together with certain slaves which belonged to the Carrickfoyle plantation, but which had been employed in cultivating the Fernbrook plantation.

Another bill had been filed in Jamaica by the trustees who held the £12,000 on the trusts of the marriage settlement of R. J. O'Connor, and others, against the mortgagees.

Two decrees were made in Jamaica.

An appeal was made to his majesty in council against those decrees, and they were partly affirmed and partly varied, and the proceedings in the suit were still going on.

The present bill had been filed by the assignees of the first mortgagees against several defendants having claim, for an account

of what was due on the £7732 : 19 : 2 and £2000, (which were the further advances,) and in default of payment, a foreclose was prayed.

For the demurrer, it was contended, that a bill could not be filed here to carry a decree into execution made in a court of different jurisdiction: that the decree in the colonies was conclusive; and that there was no authority that a supplemental bill could be filed here to carry the decree into execution.

It was also said, during the argument, that his lordship had to decide between the conflicting cases of *Beckford* v. *Kemble* and *Bayley* v. *Edwards*.

The MASTER OF THE ROLLS did not decide the point as to whether a supplemental bill could be filed in this country to enforce a decree made in the colonies; but, having commented on the cases of *Beckford* v. *Kemble* and *Bayley* v. *Edwards*, and after having read a part of the judgment in the latter case, his Lordship observed, that the judgment in that case did not appear to be correctly reported, and that, therefore, he must decide this case independent of the authorities cited, and on its own merits. And his Lordship said, that, as the whole matter was now before a court of competent jurisdiction, and was in progress of being decided, the parties were not competent to prosecute the suit in this country.

Counsel.—Mr. Treslove, Mr. Pemberton, and others.

Cases cited.—*Bayley* v. *Edwards*, 3 Swan. 703; *Beckford* v. *Kemble*, 1 Sim. & S. 7.

NOTE.—The foregoing is but an imperfect report of this case, but we are unable to give it more fully without being drawn into the very long and complicated details of the case, which would extend far beyond our limits. There was another point in this case arising out of the circumstance of the slaves belonging to the Carrickfoyle plantation having been removed to the Fernbrook plantation. We subjoin two passages from the judgment of Lord Camden in *Bayley* v. *Kemble*, reported by Mr. Swanston, and which are applicable to this case.

"The plaintiffs in England attempt to set up the suit here in bar of the jurisdiction of Jamaica, but the causes for allowing the plea of double suits are in courts here; while this is of a second suit in a court, which is a foreign court, inasmuch as this country has no process to enforce its decree in the islands."

In another part—"As to the inconvenience, considering the difficulties of administering justice between parties occasionally living under the separate jurisdictions, I think the parties ought to be amenable to every court possible where they are travelling from country to country, and we must then endeavour to correct the mischief of these double suits as much as we can, by allowing in each country the benefit of all the other proceedings in the other part of the king's dominions, and this should be introduced by supplemental bill, or insisted upon by answer, according as occasion may require."

March 28, 1836.

Cave *v.* Foulkes.

Demurrer to a Bill of Foreclosure. Not offering to redeem first Incumbrancer.

This was a demurrer to a bill filed by a second mortgagee, to have a sale of the mortgaged estate; and the principal ground of the demurrer was, that the bill did not offer to redeem the first mortgage.

The defendant Foulkes had demised a plantation in the West Indies to trustees, for 1000 years, in trust to secure certain annuities to four sisters.

Afterwards Foulkes conveyed the plantation to Messrs. Protheroes, subject to the term of 1000 years, in trust, by receipt of the rents and profits, or by sale or mortgage thereof, to raise money for payment of the sisters, and also for payment of a debt due to themselves, and subject thereto, in trust for Foulkes in fee. There was no proviso for redemption.

The Protheroes assigned their debt, and conveyed the legal estate in the plantation to the plaintiff Cave, subject to the equity of redemption; the sisters were not parties to this deed.

Foulkes was in possession.

The Master of the Rolls said, that as the plaintiff did not offer to redeem, or to pay off the first incumbrance he had not put himself before the Court in a proper manner to obtain relief, and that therefore the demurrer must be allowed, with liberty for him to amend his bill.

Counsel.—Mr. Pemberton, Mr. Kindersley, Mr. Teed, and Mr. Booth.

Feb. 27, 1836.

Blackwell *v.* Bull.

Estate for Life by Implication—Construction of the word "family."

This was a bill filed by the executors of R. Bull against the widow and children of the testator to establish the will, and praying for an account of the profits of trade.

By the will, (which was dated the 17th of June, 1834,) the testator first willed that his business of a cheesemonger should be carried on by his wife and son for the mutual benefit of his "family." He also willed and devised, in trust, that all his real and personal property, after his wife's decease, should be equally divided between his children, their executors and assigns, share and share alike.

There were five children, the eldest of whom (the heir at law) was of the age of 18.

Two questions arose on the construction of this will; first, what was meant by the word "family?" the other question was, whether the wife took an estate for life by implication in the real and personal property not employed in the trade?

In arguing the case, (as to the estate for life by implication,) a distinction was taken between the case of real and personal property; and the circumstance of one of the parties taking being the heir at law was observed upon.

The Master of the Rolls took time to consider his judgment.

APRIL 16, 1836.

His Lordship, in giving judgment, after having read the will, said—Several questions arise on its construction.

The widow alleged, that she was entitled to a share in the trade, and the amount of the share which she claimed was one-third, in analogy to the statute of distributions. She also claimed to be entitled to a life estate, by implication, in the property not employed in the trade. The children, on the other hand, contended, that the word "family" meant the children, in exclusion of the widow, and claimed the personal estate as next of kin, independently of the statute of distributions; and one of the children claimed as the heir at law. His Lordship observed, that the word "family," in common parlance, was capable of so many interpretations, that, if one particular meaning was put upon it, it must necessarily defeat the intention of the testator in some circumstances in which he might be placed. It might mean wife and children, brothers and sisters, next of kin, or any other persons, according to what relatives the testator might have. His Lordship must, therefore, in considering the construction to be put upon the word "family," endeavour to find out the intention of the testator by considering the circumstances in which he was placed with the context of the will, and in so doing he was of opinion, that the testator intended that the wife, together with the children, should enjoy the benefit to be derived from the trade. And as the wife and son had carried on the trade, he thought that they were entitled to an allowance for so doing.

As to the rest of the property not employed in trade, and which was given to the children after the death of the wife, his Lordship declared that the widow was entitled to a life interest both in the real and personal estate.

His Lordship directed certain inquiries to be taken as to what was a sufficient compensation for carrying on the trade, and, as there was no power of leasing, whether it would be for the benefit of the children that the premises be let on building leases.

Counsel.—Mr. Wray for the plaintiffs; Mr. Blake for the widow; Mr. Fuller for the younger children; Mr. Wright for the heir at law.

Authorities cited.—As to the word "family," *Cruwys* v. *Colman*, 9 Ves. 323; *Barnes* v. *Patch*, 8 Ves. 607; *M'Leroth* v. *Bacon*, 5 Ves. 158; *Brandon* v. *Brandon*, 3 Swan. 319.

As to the life estate by implication—*Faulkner* v. *Faulkner*,

1 Vern. 22; *Exp. Rogers*, 2 Mad. 449; *Hammond* v. *Neame*, 1 Swan. 35; *Bird* v. *Hunsdon*, 2 Swan. 342; *Crawford* v. *Trotter*, 4 Mad. 361; *Bullock* v. *Stones*, 2 Ves. 521; *Hutton* v. *Simpson*, 2 Vern. 723; 2 Powell Dev. 199; *Dyer* v. *Dyer*, 1 Mer. 414; *Roe d. Bendale* v. *Somerset*, 5 Burr. 1608; *Smarthill* v. *Schollar*, Freem. 458; *Doe d. Armandale* v. *Brazier*, 5 Bar. & Ald. 64.

NOTE.—That though the case of *Hutton* v. *Simpson*, 2 Vern. 723, (which is a devise to one of two co-heirs, after the death of the testator's wife,) is considered by Mr. Powell (in his treatise on Devises, vol. 2, p. 200,) as a considerable extension of the doctrine of implication, yet it must be admitted, that the present case is a still further extension.

APRIL 15, 1836.

SAYER *v.* BIRCHMORE.

Prosecuting Claims after a Decree and Distribution of the Fund.

The plaintiffs were persons, some of whom claimed as the next of kin, and others as the representatives of the next of kin, of a testator; and the defendants were persons, some of whom were found by the master to be the next of kin of the testator, and the others were his executors; and the object of the bill was to establish the rights of the plaintiffs to shares of the personal estate undisposed of by the testator, and to make the defendants refund.

The testater, (who died in 1814,) by his will and codicils, gave all his personal estate to his wife, but she dying in his lifetime, the legacy became lapsed, and, consequently, to be divided amongst his next of kin.

It appears that a suit had been instituted by the executors for the purpose of distributing the fund, and a reference had been made to the Master, who found some of the defendants to be the next of kin. The plaintiffs, who were alleged to be the next of kin, did not appear before the Master to establish their claims; they were exceedingly poor persons, and it was stated, that from 1816 to 1821, had been endeavouring to establish their claims, but that they did not so much exert themselves, because the executors promised that the fund should not be distributed without telling them. Further particulars of the case will be found in the judgment of the Master of the Rolls. The plaintiffs had not proved the relationship of the testator; but it was considered as the practice, (in order not to take up the time of the Court,) that a decree was to be made subject to the investigation of their pedigree before the Master.

The MASTER OF THE ROLLS (in giving judgment,) said, that the case of *David* v. *Frowde*, had undoubtedly established the doctrine, that after a fund had been distributed, under a decree, that parties were not precluded from prosecuting their claims to have the property refunded; but in that case the proceedings were at-

tended with extraordinary rapidity. The plaintiff did not at first know of her rights; but so soon as she was informed, she came to London from Wales, and claimed without any unnecessary delay. In the present case the plaintiffs did know of the proceedings, but did not prosecute their claims before the Master; and that they knew of the proceedings was proved by the letter of their solicitor, which was written in 1833, and which was to the following effect: That their clients (meaning the present plaintiffs,) had put into their hands the papers and documents supporting their claims as next of kin, which papers and documents had been lodged with two different solicitors, for the purpose of carrying in such claims before the Master, and which then appeared, by some unaccountable negligence, was not prosecuted.

This letter, as also the evidence of one of the witnesses, undoubtedly showed, that the plaintiffs did know of the proceedings, because they refer to them: but the reasons which were stated for not prosecuting their claims were, first, a fraudulent concealment: this, however, could not be maintained, as it was proved that they had knowledge of it. Secondly, intimidation, and the misconduct of their solicitors. There was no evidence as to the misconduct of the solicitors. They are stated to have been intimidated; but then the plaintiffs say that they had no knowledge of their rights; how, then, could they have been prevented prosecuting their claims, if they had no knowledge respecting them? On looking, therefore, into this case, his Lordship could not say that it was to be determined by the case of *David* v. *Frowde*, which was so different as to the knowledge of the parties.

Counsel.—Mr. Kindersley and Mr. Moore for the plaintiffs; and Mr. Pemberton and Mr. Lynch for the defendants.

Case cited.—*David* v. *Frowde*, in the Rolls' Court, not yet reported.

LORD CHANCELLOR'S COURT.—March 30, 1836.

Saunderson *v.* Walker.

Permission granted to file a Copy of a Petition, the Original being lost.

Mr. Cooper applied for an order to permit a copy of a petition to be filed instead of the original. The petition had been originally presented to the late Master of the Rolls, (Sir John Leach,) but by an arrangement it was heard before Lord Brougham, the then Lord Chancellor, and an order obtained, but, as was the case with many of his Lordship's papers, the petition could not be found, for the purpose of drawing up the order. Mr. Murray, the registrar, stated, that the copy of the petition had been left with the secretary of the late Master of the Rolls, and had indorsed upon

it the signature of Mr. Wingfield, the secretary, which signature was the official notice that the petition had been answered.

The LORD CHANCELLOR thought that there could be no objection to granting such permission, provided a certificate was obtained from Mr. Murray, which should identify the copy.

APRIL 20, 1836.

Mr. Cooper again applied to his Lordship, stating that the necessary certificate had been procured from Mr. Murray, as to his belief of the identity of the copy which had been left with the secretary of the late Master of the Rolls, Sir John Leach. His Lordship thereupon gave permission to file the copy.

APRIL 21, 1836.

TAYLOR *v.* HARRISON.

Construction of the 5th General Order of 1828.

This was an appeal against a decision of the Vice-Chancellor on the construction of the 5th of the amended orders of 1828.

The order of reference, which was obtained within the proper time, was not served till two days after the expiration of the six days mentioned in the order.

The Vice-Chancellor had decided that the reference was not made within the proper time.

It was now urged, whenever it was intended that an order should be served within a certain time, it was mentioned, as in the 14th and 17th Orders, but the time was not mentioned in the 5th and 12th Orders; and it was contended, that the Vice-Chancellor had put a wrong construction on the order.

It was further contended, that the obtaining the order fixes the date of the reference, and this order was obtained within the time, and that, after all, there was only a delay of one day, since Sunday was one of the intervening days.

On the other hand, it was contended, that the order allowed eight days for taking the exceptions, and six days more for obtaining the report, and that the Vice-Chancellor, who was one of the judges who framed the order, was best able to put a construction upon it, and that the same question had been before the Court in the case of *Pearce* v. *Hodgson*.

The LORD CHANCELLOR, in deciding the point, said that the obvious meaning of the order was, that the order of reference must be obtained, and the report made, within the six days. The 12th Order assisted in the construction of the 5th Order, as the same phrase used in the former order would explain the meaning of the latter order, wherein the word "referring" means an order of reference and the proceedings thereon: therefore the decision of the Vice-Chancellor was correct.

Counsel.—Mr. Wakefield for the plaintiffs, and Sir William Horne for the defendants.

ROLLS' COURT.—March 19, 1836.

Groves *v.* Clarke.

After an Order for a Settlement, and the Wife dies before the Proposals, whether the Children are entitled.

In this case a decree had been made in which it was referred to the Master to make a settlement on Mrs. Groves, with liberty to make proposals. The children were not included in this decree. Mrs. Groves died on the 1st of October, 1834, before any proposals were carried in to the Master, leaving the plaintiff, her husband, and an only daughter, who married the defendant Clarke.

The question was, whether, under these circumstances, the Master could listen to proposals for a settlement on Mrs. Clarke, the daughter.

It was contended, that no proposals having been carried in, during the wife's lifetime, the child was not entitled to a settlement, the wife having died, the interest of the child was shut out; and that as the children had no original right, how then could they claim after the death of the wife, their right following hers; she must be there to insist on the right; and that the property would go to Mrs. Groves's husband, as her personal representative. It was asked, what kind of settlement could Mrs. Clarke require could she include her children? and that, as Mrs. Clarke was married, she must be presumed to be provided for, but that the plaintiff, her father, was in indigent circumstances.

On the other hand it was contended, that Mrs. Groves had a right to the settlement before the decree, and the decree established that right.

[Master of the Rolls.—The property belongs to the husband in right of his wife, but she intercepts the property in obtaining a settlement for herself and children.]

April 18, 1836.

The Master of the Rolls, in giving judgment, said, that on the 19th of April, 1834, a decree had been made in the cause in which Mrs. Groves was a party; and by the decree it was referred to the Master to approve of a proper settlement of the interest of Mrs. Groves, with liberty to make any proposals before the Master. On the 30th of October, 1834, before any proposals were made, Mrs. Groves died, leaving the defendant, E. Clarke, who was her only daughter, and who had married the defendant her surviving. The bill was filed by the husband of Mrs. Groves, in her right, as her personal representative, against Mr. and Mrs. Clarke.

On the part of the plaintiffs it was contended that the reference to the Master was for a settlement on the wife and not on the children, and that the children took no interest under the decree, but only derived an interest from their mother, and that if they were to have an interest, it was on the proposal being brought in, and

that the plaintiff as the representative of the mother was entitled to the property.

It was said, that the decree ought to have stated that it was to be for the benefit of the children, and that they were not at liberty, under the decree, to make proposals. His Lordship said, that it did not appear material that there were no proposals; in the case reported in 2 Ves. 671, and in *Murray* v. *Lord Elibank*, it did not appear that any report had been made; but in *Roe* v. *Jackson*, while the wife lived no proposal was carried on, and it was held, not to prevent the title of the children to a settlement; and in the case of *Murray* v. *Lord Elibank*, it is stated in the judgment, that no proposal was made before the wife died, and the children were also held to be entitled.

The difference between the decree in that case is, that in this decree there are no words which comprise the children; no words, at least in form, inserted in the decree. His Lordship said the mode in which it was applied for, was no consequence in guiding the decision of the Court.

There was no question raised as to whether, under the decree the Court could order the husband to make a provision for the wife, without making a provision for the children. In the common case where a settlement is ordered to be made on the wife, she could, during her life, waive her right to a settlement, and could thus abandon the children: but if she claimed without mentioning the children, they must be provided for in the settlement, and whenever a decree had been obtained, the children had always come in for a benefit; his Lordship having observed on *Lloyd* v. *Williams*, said that in *Murray* v. *Lord Elibank* Lord Eldon thought that, after bill filed, the trustee could not exercise his discretion as to paying the rents and profits and handing over the personal estate to the husband; and that the bill makes the Court the trustee; and he does not express a different opinion as to the right of the children if the wife does not waive her right; for he says—"I should have supposed a decree made in the cause, proceeded upon the right or equity in the wife at the filing of the bill; for decrees are only declarations of the Court upon the rights of the parties, when they begin to sue. The wife is entitled to call for a declaration that she then had a right to a provision for herself and her children; and yet it is clear, after such a bill filed, she might come into court and consent to her husband's having the fund entirely under his dominion. If she does not, the Court, by the decree, orders a proposal to be made for a settlement upon the wife and issue."

But it was said that there was only one daughter, who was married, and therefore she must be considered as provided for. His Lordship said that circumstance would make no difference as to the claim for a settlement, it would only effect the form of the settlement, when the proposals were brought in before the Master.

Upon the whole, therefore, his Lordship said, that the defendant Clarke was entitled to the benefit of the decree, and it was referred to the Master to approve of a settlement on Mrs. Clarke.

Counsel.—Mr. Pemberton, Mr. Spence, and Mr. Sutton Sharpe.

Cases cited.—*Lloyd* v. *Williams*, 1 Mad. 466; *Murray* v. *Elibank*, 10 Ves. 88; 13 Ves. 1; *Johnson* v. *Johnson*, 1 Jac. & Walk. 479; *Anon.* 2 Ves. 671; *Roe* v. *Jackson*, 2 Dick. 604; *Macaulay* v. *Phillips*, 4 Ves. 15; *In re Ann Walker.*

LORD CHANCELLOR'S COURT.—April 18, 1836.

Woods *v.* Woods.

Construction of the word "Family"—Prosecuting Claims against Trustees after Thirty Years.

This was an appeal from an order of the Vice-Chancellor, who had overruled a demurrer to a bill filed by the children of a testator, against the executor and executrix of his will. The question arose on the construction of the will of the testator, who was very ignorant, and spelt very badly, the letters having no connection with the sound of the words. There was, however, no difficulty in discovering what words were intended. It will be unnecessary to go into the details of this case, which depended on its own peculiar circumstances, and which is of no importance, except as to two points, which may be stated without going into the details. The first was as to the construction of the word "family;" many cases were cited in order to give a particular construction to that word, but

The Lord Chancellor said, that the word family was subject to various interpretations, according to the peculiar circumstances of each case, and that the authorities cited had no application to this case.

It will be perceived, on referring to the case of *Blackwell* v. *Bull*, ante, page 54, that his Lordship's opinion coincides with that of the Master of the Rolls, and that the rule for the construction of the word "family," must now be considered as finally settled.

The second point was, that the plaintiffs had allowed thirty years to elapse without prosecuting their claims against the defendant, the executor, who claimed to be entitled to the property devised by the will, as the purchaser from the other executrix.

His Lordship decided, that the lapse of time would not deprive the plaintiffs of their rights against the two persons who acted as trustees, and who had endeavoured to deprive the plaintiffs (the *cellesque trust*,) of their rights. And his Lordship declared that

the order of the Vice-Chancellor was right, and he dismissed the appeal with costs.

Counsel.—Mr. Wigram and Mr. Koe for the plaintiffs, and Sir William Horne and Mr. Anderdon for the defendants.

Cases cited.—As to the lapse of time, *East India Company* v. *Hinchman*, 1 Ves. jun. 287; *Jones* v. *Jones*, 3 Mer. 161.

VICE-CHANCELLOR'S COURT.—March 26, 1836.

Turner *v.* Turner.

Will, Construction of, as to Accumulations, and as to whether an Annuity is given free from the Duty.

A question arose in this case on the construction of the will of a testator, who had directed certain annuities to be paid to children, for their maintenance, until they attained the age of twenty-one, and after they had attained that age, he gave his trustees a discretionary power, out of the income of his residuary personal estate, to maintain the children till they attained the age of twenty-five; and he directed the overplus to be invested in the funds, which was to form part of his residuary estate; and, on the children attaining the age of twenty-five years, the trustees were to divide his residuary estate amongst the children, in certain parts therein mentioned. Two of the children who had attained the age of twenty-five years, claimed to be entitled to shares in the accumulations which would take place of the residue, during the period which should intervene between the ages of twenty-one and twenty-five of the younger children, because it was contended, that the accumulations formed part of the residue, and the testator had directed the residue to be divided between the children.

The Vice-Chancellor, however, thought differently, and said, that as each child attained the age of twenty-five, he or she would become entitled to his or her share in the residue, and could claim no part of the accumulation which might take place after that period.

Two other questions arose; one was, whether the words "clear yearly sum" could be construed clear of the legacy duty. His Honour said those words were introduced long before the legacy duty was imposed, and therefore could not, of necessity, be intended to mean a legacy free from the duty.

Counsel.—Sir W. Horne, Mr. Knight, Mr. Jacob, Mr. Chandless, and others.

ROLLS' COURT.—April 20, 1836.

Berrey *v.* Armistead

Purchase—Contract set aside on the ground of Fraud—Obtaining the Purchaser to execute a Deed of Covenant, and obtaining the Purchase-Money before the Contract was completed.

This was a bill filed by the plaintiff Berrey, (a purchaser,) against the defendant Armistead, (a vendor,) to set aside the contract, on the ground of fraud, and to have the purchase-money returned. The statement as to the fraud will be found in the judgment of the Master of the Rolls. It was also prayed, that should the circumstance of fraud not be established, that the purchaser might be released from his contract, on the ground that the vendor could not make out a good title, because he could not answer certain queries made on the abstract of title. One query was as to the time a fine was levied, and the chirograph of the fine had been required to be produced, which had not been done.

It was contended, on the part of the plaintiff, that it ought to have been produced, inasmuch as that it might be a revocation of a will. On the other hand it was contended, that as it had been made for the purpose of confirming a mortgage, the fine and the mortgage being but one transaction, it was only a revocation *pro tanto*. For the plaintiffs it was admitted, that if that had been the case, the defendants were right: but the plaintiff did not admit that the fine had been levied for the purpose of the mortgage, but that it had been levied to a Mr. Rawsthorne, a solicitor, as a trustee, for the purpose of barring dower, in order the better to enable the party who levied the fine to mortgage his property at any time, and that, consequently, it would be an absolute revocation. It was also contended, that as the purchaser had been kept three years in a state of uncertainty, that that was a sufficient ground for abandoning the contract. His Lordship, however, said, that in this case time did not appear to have been the essence of the contract. On the other hand, it was contended, that the question of title was not raised on the pleadings, and that that question ought to be gone into before the Master.

The Master of the Rolls, in giving judgment, said, that it seemed that on the 20th of September, 1832, a sale took place in lots, several of which lots the plaintiff Berrey claimed to be the purchaser, and the Defendant Armistead was the vendor. Subsequently to the sale, a contract took place for the purchase of another estate, between the same parties, and in January, 1833, three abstracts of title were delivered; and on the 31st of January the abstracts were returned, but no material objection was made to the title, but there were queries in the margin of the abstracts. On the 13th of February, the abstract of title was sent back, with answers to the queries. At this time both the vendor and the purchaser

were willing to carry the contract into effect: the same abstract of title, however, had been examined on behalf of a mortgagee, and the question as to the production of the chirograph of fine raised; and there were queries on the abstract. The objections were considered by the purchaser not to be a matter of importance at that period, and not being a subject for further consideration.

Mr. Berrey, the purchaser, afterwards met Mr. Bradley, a conveyancer, who had advised on the title to the same property, on behalf of the mortgagee. Mr. Bradley told him that on examining the title he had found a defect, by reason of the fine being a revocation of the will. Mr. Berrey, the purchaser, was surprised at this, and wrote a letter to his solicitor, Mr. Wilson, who, on receiving the letter, communicated the information to the solicitor of the vendor, saying, that he was desirous of obtaining a better title. On the 28th of February, there was an understanding, that the purchase should not be completed till the circumstance of the fine had been cleared up, this being the end of February, and the parties on both sides still willing to complete the purchase.

The conveyance having been engrossed, and in possession of the solicitor of the purchaser, on the 2nd of March, (which was on a Saturday,) Willis, the defendant's solicitor, called on Wilson, and saw Taylor Wilson, the father of Thomas Wilson, who was a very old man, and requested of him to send up the engrossed conveyance, which was agreed to, but upon the distinct understanding that the title should be cleared up. On the 4th of March, which was on Monday, Mr. Willis called on the purchaser, and procured him to pay the purchase money, on the understanding that the title should be cleared up. Wilson is not informed of this till afterwards. Willis afterwards called upon Wilson, and in the course of conversation, requested that he would write a letter to the purchaser, giving him to understand that he must execute certain deeds of covenant for the production of title deeds which were in the possession of the mortgagee, and which were empounded. Wilson said that he should do no such thing, and an agreement was made that they should all meet at Mr. Bradley's in order to discuss the matter. They do not distinctly make out whether they met there or not. Mr. Wilson however goes to Sligh, and sees Mr. Bradley, and from the conversation had reason to think the objections valid, and instead of going to Bolton, where the meeting was to take place, he goes some where else. Mr. Willis and Armistead then went to the purchaser and had an interview withhim, during the absence of Mr. Wilson, and procured him to execute a deed of covenant for the production of the deeds, which were not in his possession, though the conveyance had not been executed; he then went to Lancaster, and goes to the office of Wilson, and tells him of the transaction. Mr. Wilson informed him that he should not have done it had he been there; the instant he was informed that the transaction had been objected to, he ought to have

delivered up this deed of covenant to the purchaser's solicitor, and returned the money which he had obtained from the purchaser. Had he delivered up the deed at that time, and paid back the money, he might have insisted that the title should be completed, even though his conduct appeared to have been fraudulent. His Lordship said he had no hesitation in saying, that the purchaser ought to have been placed in the same situation as he was in before that transaction took place. It was contended that the contracts ought to have been delivered up. If Mills had done what he ought, he would have restored the money, and delivered up the deeds. His Lordship was of opinion, however unreasonable the transaction might have been, there was a possibility of giving Armistead the benefit of the contract, but he insisted that the title had been accepted, and up to the time the bill was filed he did not admit his errors, but he brings parties for the purpose of proving that which he knew was in point of fact wrong, and he has still maintained this from the time the bill was filed, up to the present time. The question, therefore, was, whether his Lordship ought to consider these circumstances such as would entitle the defendant to come here, and call for a specific performance of these contracts, which were subject to no impeachment, had not that transaction taken place, and which might have been enforced if he had not done so. His Lordship was of opinion, that the vendor was not entitled to the assistance of a court of equity to enforce the contract; he must, therefore, declare, that the plaintiff was fraudulently induced to complete his purchase, and he ordered the contract to be delivered up to be cancelled, the costs to be paid by the defendant, and the plaintiff was to account for the rents which he had received, and the defendant for the interest of the money.

Counsel.—Mr. Pemberton and Mr. Sutton Sharpe for the plaintiff; Mr. Swanston, Mr. Kindersley, and Mr. Walker, for the defendants.

FEBRUARY 24—MARCH 7, 12, 15.

BOOTH *v.* LEYCESTER.

PALMER *v.* LEYCESTER.

Interest on Arrears of Annuities—Application to dismiss a Bill after it is set down for Hearing.

The case was this:—Sir John Roger Palmer, being entitled in tail to certain estates in Ireland, under the will and settlement of his grandfather and father, (subject to certain charges thereon,) suffered a recovery. He afterwards married Miss Hanway, who was entitled under the will of Mr. Hanway, to a moiety of the property forming Hanway Street, and to other property in the funds. On the marriage a settlement was made, by which the Hanway estate was to be sold, and the produce applied in payment of the charges on the Irish estates, which estates were to be

charged with a jointure for Mary Hanway, and subject thereto to Sir J. R. Palmer for life, to Miss Hanway for life, then for the children, with an ultimate limitation to Sir J. R. Palmer in fee.

A part of the Irish estates were sold under a decree of the Court of Chancery in Ireland, and the produce applied, amongst other things, in payment of the incumbrances.

Sir J. R. Palmer, having got into difficulties, borrowed money on annuity, and afterwards went to reside in the Isle of Man, where he died intestate and without issue. After his death the trustees accumulated the rents of the Hanway estate, and paid Lady Palmer's jointure out of the part of the Irish estates which remained unsold. In the meantime the annuities remained unpaid. Sir Henry Palmer was the heir at law of Sir John Roger Palmer.

The first bill was filed by the assignee of the arrears of the annuity, who claimed the arrears and interest thereon for six or seven years.

The second bill was filed by Sir Henry Palmer against the trustees of the marriage settlement of Sir J. R. Palmer and Lady Palmer, (she having died,) in order to establish his rights under the settlement as the heir at law of Sir J. R. Palmer.

The annuity from which the interest on the arrears of the annuity was claimed, was charged and chargeable upon the Hanway estate, and to be paid during the life of Sir J. R. Palmer, with a covenant to pay the annuity, and with power of distress and entry, if the annuity should be in arrear for twenty-one days, for satisfying the arrears of the annuity, and all "costs, damages, and expenses" occasioned by non-payment of the annuity; and of entry and receipt of the rents and profits after forty days until satisfied the annuity and all arrears, and all "costs, damages, and expenses" occasioned by non-payments; then followed a demise of the moiety of the Hanway estate to a trustee for a term of years, in trust for securing the regular payment of the annuity.

There was also a proviso for re-purchase, on one month's notice. It was also secured by a warrant of attorney, and there was a memorandum of agreement indorsed on the warrant of attorney, stating that it was made for the purpose of securing the annuity, and that no judgment should be entered up, unless the annuity was in arrear for twenty-eight days. There was no allusion to any interest on the arrears: and it was admitted that this annuity-deed was made in the usual form, Judgment had been entered up on the warrant of attorney.

The annuities were thirty-two in number, and Mr. Booth had purchased the arrears of some of these annuities. It was however agreed, that as all the annuity deeds were nearly alike, that the decision as to two of the deeds should settle the question as to all the rest.

For the plaintiff, Booth, it was contended that inasmuch as that

Sir J. R. Palmer was not in England, that the plaintiff could not enforce his security against him on the judgment; and that the words "costs, damages and expences" in the deeds of annuity would be considered as an agreement that the arrears should be paid, and that notice had been given to the original trustees, but that the present trustees were only the representatives of the original trustees, except one, which might account for their denying having received notice. It was contended for the plaintiff, Sir Henry Palmer, that Sir J. R. Palmer took an estate tail by implication, which estate had been barred by recovery, and that Sir H. Palmer was entitled to take the fee under the settlement made on the marriage of Sir J. R. Palmer, as his heir at law, and claimed the Hanway estate in substitution of a part of the Irish estates, which had been sold to pay those incumbrances which ought to have been paid out of the proceeds of the sale of the Hanway estate.

For the defendants it was contended that, the Courts of law would not grant interest on the arrears, and if they did, there was no reason why a court of equity should; that the words in the annuity deed did not at all apply to the interest on the arrears; and that the trustees were going on paying the rents to Sir J. R. Palmer, without the annuitants making any claim till 1832; and that since the case of *Tew* v. *Winterton*, there was no instance of interest ever having been recovered on the arrears of an annuity; that there was a sort of claim made for arrears in *Anderson* v. *Dwyer;* and that if you brought an action, a jury would not give interest, except in the shape of damages, and that this was a case in which they would not give damages. Mr. Tinney during the argument, contended that Ridgway's Reports (which had been cited,) were not frequently cited, and were not considered high authority.

The MASTER OF THE ROLLS said, that the book was not unfit to be cited. The trustees denied all notice of the annuities, and that if the interest on the arrears could be claimed under the words "costs, damages, and expenses," it must in some cases come within the usury laws.

It was further contended, that Sir J. R. Palmer only took an estate for life, and that Sir H. Palmer took an estate tail under the settlement of his father, consequently, his eldest son ought to have been made a party. A question then arose, whether the bill should not be dismissed with costs.

The MASTER OF THE ROLLS said it was irregular to obtain an order to dismiss the bill with costs, when the cause had been set down for hearing.

APRIL 16, 1836.

His Lordship, in giving judgment, said that the plaintiffs in the first case claimed to be entitled to certain arrears, together with interest upon those arrears.

The plaintiffs in the second cause claimed to be entitled as heir at law of Sir J. R. Palmer, and to have the Middlesex estate conveyed and assigned to him by the trustees, a part of the Irish estates having been sold, instead of the Middlesex estate. Mr. Hanway, to whom the property belonged, made his will in 1772, whereby, after giving certain annuities, gave all his estates to his nephew, Sir W. Hanway, for life, remainder to his children; the testator died in August 1772; his nephew died in 1780, leaving two children, a son and a daughter; the son attained twenty-one and died, and the daughter attained twenty-one; each were entitled, besides a moiety of the Hanway estate, to certain sums of stock, and a sum of money secured by mortgage.

In 1791, a marriage took place between Miss Hanway, the daughter, and Sir John Roger Palmer.

Sir J. R. Palmer was entitled to estates in Ireland, under the will and settlement of his father and grandfather, charged with incumbrances effected by both of them. Sir J. R. Palmer had also charged the estate with his own debts.

By articles made on the marriage of Sir J. R. Palmer with Miss Hanway, and of the settlement made in pursuance thereof, the Hanway estate was conveyed to trustees, subject to a term of two thousand years, in trust to sell and pay off the incumbrances in the priority therein mentioned; and the Irish estates were conveyed to trustees for three thousand years, in trust, to secure a jointure by way of pin-money to Miss Hanway, and subject thereto, they were limited to Sir J. R. Palmer for life, then to Miss Hanway for life, then in favour of the children, with an ultimate limitation to Sir J. R. Palmer in fee.

It appeared that a suit had been instituted in Ireland for the purpose of foreclosing the equity of redemption, and the suit having been brought to a hearing, it was decreed that a part of the estates should be sold, and the money applied in payment of the incumbrances.

The Middlesex estate was not sold, and it was said that the trustees had applied a part of the personal property given by the will of Mr. Hanway towards reducing the debts charged on the Irish estates. In 1794, the brother of Lady Palmer died, and she became entitled to receive his share, given by the will of Mr. Hanway.

Sir J. R. Palmer being indebted, borrowed money on annuities, and in August, 1809, one of the annuities was assigned to Mr. Booth. (His Lordship here repeated what we have already written, as to the mode in which the annuity was secured.) A judgment was entered up in 1810, on the warrant of attorney. In February, 1819, Sir J. R. Palmer, died intestate, and without issue; and it was alleged that he died in embarrassed circumstances, and that he had retired to the Isle of Man.

After the death of Sir J. R. Palmer, Lady Palmer received her

jointure of £600 out of the Irish estates, and the trustees accumulated the rents of the Middlesex estates. In April 1829, Lady Palmer's share of the mortgage money, given by the will of Mr. Hanway, was received by the trustees and invested.

Booth having purchased the arrears of the annuities, took an assignment in 1831; the deed recited that there was due on the judgment for arrears the sum of £486 3*s.* 6*d.*, and that he had purchased the arrears, (which were for six or seven years, for £98.)

Lady Palmer died in November 1832: there was no issue of the marriage, and by the limitation of the settlement, the remainder became vested in Sir H. Palmer, and a part of the Irish estates having been applied in payment of the debts, he claimed to be entitled to the Hanway estate, which ought to have been sold for payment of the debts on the Irish estates.

Booth's bill had been filed in January, 1833, against the trustees of the marriage settlement of Sir J. R. Palmer, and against Sir H. Palmer, for recovering the arrears of the annuities, and the interest on such arrears.

Sir H. Palmer's bill was afterwards filed against the trustees, in order to establish his rights as heir at law of Sir J. R. Palmer. Attempts had been made to dismiss the bill with costs, and it was objected to for want of parties, and that Sir J. R. Palmer was only entitled for life. His Lordship thought at the time that that attempt could not be supported. The only remaining question was, whether Booth was entitled to interest on the arrears? In the early cases it was admitted in the cases of dower, rent-charge, annuities by will, and in some other cases; but in the late authorities, interest on the arrears was not allowed. But it was said the case was different where the annuitant was a creditor, and that he could recover at law, by way af damages, and which would be awarded to him on the grounds that the arrears could not be recovered, owing to the absence of Sir J. R. Palmer from England. It did not appear that the evidence supported those facts.

As to the other point, the contract was for the purchase of redeemable annuities, during the life of Sir J. R. Palmer, which were secured by demise; it did not however appear anywhere that there was a contract that interest should be paid on the arrears; both the annuities were secured by judgment. Many cases were cited, in order to show that the Court would give interest where there was a judgment. In the old cases, interest, as it appeared, was considered as a matter of discretion; and if the Court gave interest, a special case was necessary; as where the debtor came to a court of equity to seek relief, the Court had given interest on the arrears; and in *Godfrey* v. *Watson*, it is to be inferred that the Court would not give interest where the creditor applied for relief. His Lordship said, that as to the judgment it would be left for a jury to decide on the question of damages, and he was of opinion, that on the judgment in this case, interest could not be

allowed on the arrears. Sir John Leach had laid down the rule on this subject in the case of *Newton* v. *Taylor*, which was printed by Messrs. M. & K., but not yet published. The cases relied on by the plaintiff Booth, were *Newman* v. *Auling*, *Dale* v. *Cox*, and *Power* v. *Bennis;* the latter case did not shew on what ground the appeal was dismissed.

In *Newman* v. *Auling*, it was thought important that the security was given for the maintenance; and in *Dale* v. *Cox*, the punctual payment of the annuity was said to be the sole inducement for letting in the charge, and that the annuitant could not have received any money from the land, as the rents were in the hands of a receiver appointed by the Court, at the instance of the grantor of the annuity; there were therefore special circumstances in those cases. His Lordship therefore said, that he could not allow interest on the arrears of these annuities, without acting contrary to the rules which the Courts had adopted for some years past.

The costs of the suit to be paid out of the fund.

Authorities cited.—*Bradshaw* v. *Astley*, 4 Brown, P. C. 505, 1717; *Leggatt* v. *Sewell*, Gilb. Eq. Rep. 141, 1717; *Litton* v. *Litton*, 1 P. W. 543, 1719; *Ferrers* v. *Ferrers*, 6 Brown, 96, 1733; *The Draper's Company* v. *Davis*, 2 Atk. 211, 1741; *Godfrey* v. *Watson*, 3 Atk. 517, 1747; *Stapleton* v. *Conway*, 1 Ves. 428, 1750; 1 Dick. 273, 1753; *Morgan* v. *Jones*, 2 Dick. 644, 1784; *Dale* v. *Cox*, 1 Ridg. 153, 1784; *Power* v. *Bennett*, 2 Ridg. 256, 1790; *Teo* v. *Lord Winterton*, 3 Brown, 489; S. C. 1 Ves. Jun. 451; *Munro* v. *Billingham*, 2 Ves. Jun. 168, 1793; *Anderson* v. *Dwyer*, 1 Scho. & Lef. 301, 1804; *Thirton* v. *Kirling*, before the present Lord Chancellor when Master of the Rolls, 1835.

Cases cited as to the doctrine of the common law, in giving interest on arrears—*Gordon* v. *Swan*, 12 East, 419, 1810; *Marshall* v. *Poole*, 13 East, 98, 1810; *Lowndes* v. *Collins*, 17 Ves. 27; *Higgins* v. *Largent*, 2 Bar. & Cress. 348; *Arnott* v. *Redfern*, 3 Bing. 353; *Page* v. *Newman*, 9 Bar. & Cres. 378, 1829; *Foster* v. *Weston*, 6 Bing. 709, 1830; *Sackett* v. *Bassett*, 4 Mad. 58; *Aylmer* v. *Aylmer*, 1 Molloy, 87; *Allen* v. *Keeves*, 1 East, 435.

The before-mentioned cases were cited by Mr. Spence, in the order which we have given them; they include nearly all the cases on the subject. Mr. Seaton has collected the cases in his book on Decrees, p. 109, 125, which gives a clear explanation of the law on this subject, as it formerly stood, and as it stands at present. This book was occasionally referred to by the counsel in the course of the argument.

Counsel.—Mr. Pemberton, Mr. Wright, Mr. Tinney, Mr. Spence, Mr. Lovat, Mr. Kindersley, Mr. Wright, Mr. Teed.

APRIL 25, 1836.

KIRWAN *v.* KIRWAN.

Motion for a Receiver refused on the grounds of Delay—Bill against the Representatives of a Deceased Partner, to which the Surviving Partners were not Parties, good—Affidvait filed after Answer.

This was a motion to have a receiver of the estate and effects of a testator.

By the will of Clement Kirwan, made in 1827, and by the codicils thereto, he gave several plantations in the West Indies, and real and personal estate in England, for the benefit of Elizabeth Kirwan, his widow. and to the other defendants, who were his children. He died in July, 1831, and shortly before his death a judgment was entered up against him by the plaintiff, who filed his bill in 1834, on behalf of himself and other creditors, against Mrs. Kirwan and the children, stating, that she had employed the estate of the testator for her own purposes; that she entered into receipt of the real and personal estates, and paid several debts, but not the plaintiff's debt; that if the personal estate was insufficient, the real estate was liable; that the defendant intended to quit the kingdom and take the personal estate with her; and it prayed that a receiver might be appointed of the real and personal estate of the testator, and that the defendant might be restrained from selling those estates.

The defendant, by her answer, did not give any account of the estates; she denied having entered into possession of the real estate, but that she had taken possession of a part of the personal estate, and she denied having any intention of leaving the kingdom, till the suit was at an end.

The affidavit in support of the motion stated that, an application had been made to the Slave Compensation Commissioners, and information had been obtained, that Mrs. Kirwan had applied for compensation for the slaves on the testator's estates in the West Indies, and that she was described at the office of the commissioners as the executrix of Clement Kirwan, and owner in fee, and that she had endeavoured to recover certain mortgage debts, due to the testator, and that she wanted to receive it without the knowledge of the plaintiff. And it stated collusion between the defendant and the surviving partners, and that she intended leaving the kingdom with the property.

For the plaintiffs it was contended, that Mrs. Kirwan had paid several debts that ought to have been paid after the judgment-debt, and that the testator's separate debts ought to have been paid before his joint debts; that she had refused to take possession for some time, and that when she found the plaintiff had moved for a receiver, she then became desirous of obtaining possession. That the plaintiff was entitled to bring forward the affidavit to prove the state of the testator's property; and that as she

had denied having taken possession, would not the Court therefore grant a receiver?

For the defendant, it was objected, that the affidavit could not be received after the answer had been filed, and that the general rule was, that an affidavit could not be received after an answer had been put in, unless the circumstances were special.

The MASTER OF THE ROLLS—The rule is, that the affidavit is not to be received in contradiction to the answer.

It was then contended that the motion could not be made unless the surviving partners were before the Court.

His Lordship said, that they had a right to go against the estate of the deceased partner, without making the surviving partners parties, and that that had been settled by Sir John Leach, some time ago.

The inconvenience of such a law was observed upon, especially in this case, where the affidavit stated collusion between the defendant and the surviving partners; that a receiver could not be appointed unless they could allege misconduct, but here they could only allege that she was going abroad.

The MASTER OF THE ROLLS, in giving judgment, said, that the circumstances stated in the affidavit did not warrant him in appointing a receiver consistently with his duty; the judgment had been obtained in 1831, and the bill was filed in 1834; then the answer was put in, by which Eliza Kirwan stated that she was not in possession of the real estates, and denied the ground which had been alleged for asking the Court to appoint a receiver. It was stated, that she was not in possession in 1834, when the bill was filed, and if at the time the answer was put in, an application had then been made for a receiver, a receiver would have been granted, as there was clearly no person in possession; but no application had been made till 1836, and then application was made on different grounds to what were stated in the bill, viz. a collusion between the representatives of the deceased partner and the surviving partners. If the motion had been brought forward at the proper time, and proper grounds had been shown for granting the motion, a receiver would have been appointed, but, as it was, his Lordship could not appoint a receiver, but he would not give costs.

Counsel.—Mr. Pemberton and Mr. Girdlestone, jun. for the plaintiffs; Mr. Tinney and Mr. Barker for the defendants.

APRIL 26, 1836.

COOKSON *v.* HANCOCK.

Will and Codicil, Construction of—Question as to Substitution.

This was a bill filed by legatees against the residuary devisee and legatee, for the purpose of establishing their rights under the will of a testator.

The testator, by his will, gave £2000 to his brother, George

Baker, for life, and after his decease, in trust for his children, share and share alike. He also gave and bequeathed the interest of £6000 to Catherine Smith, for her life; and in case her husband, Thomas Smith, survived her, he gave the interest for the life of Thomas Smith, and after the death of the survivor, the said sum of £6000 was to be in trust for the children of the said Catherine Smith, share and share alike. The testator then gave £10 to each of his maid servants; and, by the last clause in the will, he gave all the rest, residue, and remainder of his real and personal estate, (not theretofore disposed of,) to his other sister, Jane Hancock, with words of limitation in favour of her children.

The third codicil to his will was dated the third of January, 1827, twelve months after the will was made, in the following words:—"This is a codicil to my will: I hereby leave my brother, George Baker, a clear share of my estate and effects with my sisters, to have an interest during his life, and, after his decease, his share is to go between his children, provided his wife is not then living; and if his wife survives him, she is to have the interest of £1000 during her life, and on the death of the survivor of them, the whole is to be divided between his children, share and share alike; my sister, Catherine Smith, to have a clear share of my estate and effects with my sister, Jane Hancock." This codicil was not executed in the presence of three witnesses.

By his second codicil, the testator again gave £10 to his maid-servants.

It was contended, for the plaintiff, that Catherine Smith took her legacy of £6000 as well as one-third of the residue.

For the defendant it was contended, that the testator intended to revoke the whole of the will by the codicil, and to make a fresh disposition of his property; and the circumstance of his having given by the codicil the same legacy of £10 to his maid-servants as he had given by his will, was a proof that he considered he had made an entirely new disposition, and the gift of a share in the residue was a substitution of the legacy given by the will.

The Master of the Rolls, in giving judgment, said—"It did not appear that the testator meant an equality by his will; but when he made his codicil he had his will under his consideration, and there he directs an equality to be made, which appeared clear by the words of the codicil." His Lordship, (after having read the codicil,) decreed, that the brothers and sisters, or their representatives in their right, were entitled each to one third share of the residuary personal estate of the testator.

Counsel.—Sir C. Wetherell and Mr. Stuart, for the plaintiffs; Mr. Pemberton, Mr. Kindersley, and Mr. Bagshaw, for different defendants.

VICE-CHANCELLOR'S COURT.—Feb. 26, & May 7, 1836.

PODMORE *v.* GUNNING.

Parol Evidence admitted to explain a secret Trust or Undertaking referred to in a Will—Statute of Frauds.

This was a bill filed by two brothers of the name of Podmore, in right of their wives, (who were two natural daughters of Sir Thomas Staines,) against the heir at law and next of kin of Sir Thomas, and against George Gunning, as the representative of his wife, (who was the widow of Sir Thomas,) and against her heir at law, and the objects of the bill was to establish the plaintiff's claim to the residuary real and personal estate of Sir Thomas Staines.

The whole of the particulars of the case will be found in the following judgment of the Vice-Chancellor.

His Honour said, that when the case was argued before him, the plaintiffs represented that Sir Thomas Staines, previous to and at the time of making his will, communicated to Lady Staines his determination to give all his property, both real and personal, to the plaintiffs, after her death, on which occasion she proposed to Sir Thomas that if he would leave the remainder of his property to her, she would carry into effect his intention; that he accordingly made his will, dated the 5th of July, 1830, whereby, after giving £1000 (after the death of his wife) to each of his friends, Sir W. Bolton and Dr. Jarvis, he left to his wife, her heirs, executors, administrators, and assigns, the whole of his residuary estate, for her separate use, "having a perfect confidence she will act up to those views which I have communicated to her in the ultimate disposal of my property after her decease."

It was contended, for the defendants, that the words "having a perfect confidence," &c., did not, of themselves, necessarily imply, that there was an absolute direction as to the disposition of the property, but that the words were consistent with his having given some general directions respecting it, and that she was to dispose of the property in favour of the plaintiffs or not, as she should think fit, and to what amount she might choose.

The plaintiffs insisted that those words had a necessary relation to the communication which they represented Sir Thomas had made to his wife at the time she made the proposal and undertaking which appeared by the statement in the bill.

On this case two questions arose, one of law and one of fact; and his Honour said, that he could not well dispose of the case without expressing his sentiments on the law as well as the facts; and, having looked into the authorities, he was of opinion, that, if the state of facts which the plaintiffs represented in their bill had taken place, they would be entitled to the relief sought, because, independently of some of the earlier cases, it appeared to him that the decision of *Sellack* v. *Harris* settled the point. His Honour read the case of *Sellack* v. *Harris*, and said he could not but

think that the consent to perform the testator's desire took the case out of the Statute of Frauds. His Honour, having read the case of *Walker* v. *Walker*, observed that the same question had come before the Court in *Dixon* v. *Olmius;* and Lord Eldon, in *Muccleston* v. *Brown*, said, "In *Adlington* v. *Cann*, there was no trust upon the face of the will; but a paper was written afterwards which clearly demonstrates that the testator's intention was to devote the benefit to charitable purposes. If it rested there, it is clear a man cannot, by an unexecuted instrument, attach a trust upon real estate. But they pleaded the statute. That must have been allowed to be a good plea, unless the Lord Chancellor could have said, though they plead the statute, yet if they answer, admitting the trust, it would be fit to discuss, at the hearing, whether he would not give the heir the benefit of the resulting trust." Now this case of *Adlington* v. *Cann* is imperfectly reported in Atkins; and, in the argument, no notice is taken of the plea or answer, and Lord Eldon says, "In a subsequent case Sir Thomas Parker, who must have known *Adlington* v. *Cann*, took upon himself to examine it, and when it was very natural to be accurate upon it; and he says expressly, Lord Hardwicke compelled the defendants to answer. If so, we see in a subsequent case, (*Boyle* v. *Edwards*,) how Sir Thomas Sewell understood it, and this appears, also, to be the history of *Adlington* v. *Cann*, by a note of Serjeant Hill. In the case before Sir Thomas Sewell, the original answer simply stated the will. A further answer was required, and by the further answer the defendants stated that there was a memorandum not duly executed according to the Statute of Frauds." Lord Eldon expressed a doubt on the judgment of Sir Thomas Sewell, and Lord Eldon seemed to consider, as to principle, that Lord Hardwicke was right, for Lord Eldon says, 6 Ves. 69, when speaking as to the principle—"Is the Court to feel for individuals, and to oblige persons to discover in particular cases, and not to feel for the whole of its own system, and compel a discovery of frauds that go to the roots of its whole system?" But Lord Eldon seemed quite clear, that in case of a dispute where a a trust was undertaken, or by the heir who took in default of a devise, that they who undertook were bound, for he says, "Suppose the trust was to pay £100 out of the estate, and the devisee undertakes to pay it, if it is not inserted in the will, this Court would have compelled an answer on the ground that the testator would not have devised the estate to him unless he had undertaken to pay the sum;" and there is a reference to the cases in the note to 3 Ves. 38." The principle is, that the statute shall not be used to cover a fraud; if that is so between individuals and upon an individual claim, there is surely a stronger call upon the justice of this court to say, upon a private bargain between the testator and those who are to take apparently under the will, which is to defeat the whole of the provisions and policy of the law, that

they shall be called on to say whether they took the estate, as they legally may not do, for charitable purposes. In *Stickland* v. *Aldridge*, Lord Eldon said, in the case where the bill was filed by the heir against a devisee, and the devisee against the heir, in 9 Ves. 519, "The statute was never permitted to be a cover for fraud upon the private rights of individuals; and though, within the intention, it cannot be said a trust is declared under these circumstances. It is clear, a trust would be created upon the principle on which this Court acts as to fraud. In the ordinary case of an estate suffered to descend, the owner being informed by the heir, that, if the estate is permitted to descend, he will make a provision for the mother, wife, or other person, there is no doubt this Court would compel the heir to discover whether he did make such a promise." Lord Eldon, here speaking of the ordinary case, shows his view of the subject. "So if a father devises to his youngest son, who promises that, if the estate is devised to him, he will pay £10,000 to the eldest son, the Court would compel the former to discover whether that passed in parol; and if he acknowledge it, even praying the benefit of the statute, he would be a trustee to the value of £10,000; and then why, upon a similar principle, should not a trust be raised as to the whole value of the estate, the promise extending to the whole? It would be singular if the court would protect individuals, and would not act to prevent a fraud upon the law itself. In *Adlington* v. *Cann*, Lord Hardwicke was clearly of opinion that, there being nothing in the will attaching a trust, if the testator afterwards, by an unattested paper, expressing his own intention, not communicated, said, the purpose was to devote the estate to a charitable purpose, the devisee might object that he had taken under a will well executed, and the subsequent paper was not well executed. But this is perfectly different from the case of a devisor, expressing in the paper a trust which, by contract with the devisee, led to that devise; and Lord Chief Baron Parker accordingly said, Lord Hardwicke's opinion was, that such a bill must be answered; and Sir Thomas Sewell meant to follow it. I formerly expressed doubt, whether he rightly decided upon the principle: but the principle he took to be clear law, and that is sufficient."

His Honour here again repeated the case of *Sellack* v. *Harris*, and said, Lord Eldon did not allude to that particular case, but spoke of the ordinary case of a father and youngest son, and says he would be a trustee for the value of £10,000. His Honour only referred to these cases, because it was said no trust could be created in this particular case.

Suppose, therefore, on an examination of the facts, that the plaintiffs had made out a case that Lady Staines took the real and personal estates, upon the condition that they should be given to the plaintiffs after her death, they might then recover. The question, therefore, appeared to be a question of fact, which would be

determined on the examination of what had been stated by the plaintiffs in their bill, and what was given in evidence. The plaintiffs have, in distinct terms, said, that before the bill was executed, a communication was made to Lady Staines, by Sir Thomas, in which he stated his determination to give all his property, both real and personal, to the plaintiffs, after Lady Staines' death, and on that occasion she made the proposal which led to the making his will. There was not any evidence to sustain that fact, or that, in consequence of any communication, Lady Staines made any such proposal; and in the subsequent statements in the bill, they represent the case in less strong terms.

The plaintiffs charged that there was a former will made on the 30th June, which was destroyed, and which was agreed, on all hands, to have been to the same effect as the will of the 5th July, except as to the legacies. They charged, that the will of the 5th of July was made for the purpose of introducing legacies. That at the time of making the last will, Sir T. Staines expressed his wish and intention to leave the property to the plaintiffs, which Lady Staines undertook to perform; and it was admitted, that Sir Thomas had expressly enjoined her to fulfil his wishes, which she undertook to do; so that if that statement which was made by the plaintiffs was true, the defendants would be bound to perform it, but no such case is made out in the subsequent part of the bill, nor did the evidence support the fact, viz. that Lady Staines proposed to leave the property to the plaintiffs: the case, therefore, dwindled to this, viz., that on the occasion of making the will, Sir Thomas expressed his wishes, and Lady Staines agreed to act in conformity to them.

The plaintiffs stated the will of Sir Thomas, and the circumstances of Lady Staines making a will; and they stated the facts which gave rise to the question, and they charged that Sir Thomas Staines repeatedly expressed his wish as to the disposal of his property, before he made his will.

His Honour thought that statement to be of no value, unless it might be taken as corroborative evidence, or a representation or declaration of intention made to Lady Staines.

The plaintiffs represented, that a few days after the death of Sir Thomas, Lady Staines made her will, and gave and devised all the rest and residue of her property to the plaintiffs, by the description of her late husband's natural daughters; and they represent, that by another will she gave the Podmores some considerable legacies, and that she repeatedly said that the will was made in consequence of the desire of Sir T. Staines. These facts the plaintiffs support by the evidence of persons, not only as to what Sir Thomas and Lady Staines did or said at the time of making the will, but what Lady Staines did after the death of Sir Thomas Staines. The evidence as to Lady Staines making her will is material, because, immediately after the death of Sir Tho-

mas, her mind was doubly affected, which would lead her to do all that her husband had required of her.

The principal evidence in support of the plaintiffs' case was that of Dr. Jarvis, who stated that, at Sir Thomas Staines' request, he prepared his will, by which Sir Thomas bequeathed all his estates to his wife, for her own separate use and enjoyment. This was on the 30th of June, and on that occasion Sir Thomas said, I do not know whether you are aware of my having two natural daughters; I now wish to make my will and provide for them. His Honour thought it very singular that that communication was not mentioned again when the will was made, and no allusion was made to this most important communication. Dr. Jarvis then deposed, that previous to making the will, Sir Thomas addressed Lady Staines, and said, "Sarah, my wish is, that the Podmores shall have my property after your death, provided, upon inquiry, you find they are respectable; but on no account whatever shall the Bridgers have one farthing of it; it would distress me much, in my last moments, to think they would." To this Lady Staines replied, "You may depend upon me." And Dr. Jarvis, meeting Sir Thomas the morning after he made his will, Sir Thomas said, that he was not satisfied with that will, because he had not made any disposition in favour of his two friends, Sir W. Bolton and deponent, and he requested deponent to make another will. That on the 5th of July he prepared a second will, and previous to the execution of that will, Sir Thomas sent for Lady Staines, and in the presence of deponent, said, "Sarah, my wish is, that the property shall go to the Podmores, and not to the Bridgers." It appeared by this that Sir Thomas had not altered his intentions, as it here speaks to the same facts which occurred in making the will on the 30th of June. Mrs. Powell spoke very distinctly to what took place at the time of making the will, and at the death of the testator; she said she had a conversation with Sir Thomas, when he declared he intended to leave the property to Lady Staines for life, and the residue to the Podmores; and Lady Staines said that she would faithfully perform his intentions. The deponent said, after the occasion of signing the will of the 5th July, and when Sir Thomas was on his death-bed, that he strictly and emphatically directed her to follow his intentions, and expressed his entire confidence that Lady Staines would comply with his wishes; and Lady Staines, over and over again, said that she would. Shortly afterwards, Lady Staines requested the deponent would ask Sir Thomas whether she might, consistently with his wishes, leave her own property to her own relations; when Sir Thomas replied, "I will not have any part of my property go to my family or the Bridgers." It struck his Honour as very singular, that, from the great confidence which was reposed by Sir Thomas in his wife, and after his wife had received an intimation of his wishes, that there should be a reiteration of the wish of Sir Thomas, and the assurances

"over and over again," that Lady Staines would comply with his wishes, and that where there was so much confidence, Lady Staines should not think right to put the question herself, but required Mrs. Powell to do so. The deponent then went on to state, that the testator did not alter his intention, and that, in the interval between the time of his death and the time when Lady Staines made her will, she repeatedly alluded to the wish of Sir Thomas, and his earnest hope that she would comply with it. That Lady Staines lost no time in making her will, in order to carry that wish into execution; and in answer to a question put to her by the deponent, as to whether Lady Staines would follow his wishes, she answered, that she had already done so.

Lady Bolton deposed, that between the time of the decease of Sir Thomas, and before Lady Staines made her will, she had a conversation with her, and during that conversation, she said, that when Sir Thomas made his will, which was shortly before his death, he mentioned the plaintiffs as the two natural daughters of Mrs. Pemberton, and in the course of conversation with the deponent, Lady Staines expressed her determination to make her will, in order that Sir Thomas's intentions might be carried into effect, and that she expressed a nervous anxiety to do so: she said that life was very uncertain, and it ought not to be postponed. After the occasion of making her will, in July, (which was two days after the funeral,) Lady Staines said that she had made her will, and had fulfilled her promise, and had, in pursuance thereof, left the property to the two natural daughters of Sir Thomas. The deponent further stated, that Lady Staines (after her marriage with the defendant, George Gunning,) wrote to her a letter, in which she said, that Mr. Gunning had promised her to fulfil the wishes of Sir Thomas. His Honour said, that that evidence was in favour of what was stated in the bill, but that their evidence was not so plain as that of Dr. Jarvis, because he introduced that which was not introduced in the evidence of the other witnesses; for he represented that the property should go to the Podmores, if Lady Staines should find them respectable, and more importance ought to be attached to his evidence, because he was the person who, on the 24th of July, drew up the will of Lady Staines, in which will are these words.——His Honour here read the will, which provided for the payment of her funeral expenses, and gave several legacies of £500, and all the rest and residue she gave to her late husband's natural daughters; and she gave to Captain Prowse a legacy of £300, as a proof of the respect which her late husband had for him; and she appointed him her sole executor. By this will, (which Dr. Jarvis made two days after the funeral,) Lady Staines herself thought she had complied with Sir Thomas Staines' wishes, whatever they were, and she spoke of her husband in such a manner, as left no doubt that, in making the will, she had a discretionary power. It appeared, also, to his Honour,

that the plaintiffs themselves supplied the evidence, for they stated the will of August, 1831, and the evidence, whereby it might be ascertained what passed between Sir Thomas and Lady Staines. It also appeared quite clear, from what was said, on both occasions, of Dr. Jarvis making Lady Staines' wills, and the representation that she might charge the property with legacies, and that she might give legacies to whom she pleased, and also by her will, whereby she desired her funeral and other expenses to be paid, and gave several legacies, that no doubt was left as to her having a discretionary power.

By the will made in August, 1831, she did not do as she had done in July, 1830, and as the plaintiffs themselves represented; for instead of the ultimate residue of the property being left to the Podmores, she gave them considerable legacies; and it appeared to his Honour that whatever did pass between Sir Thomas and Lady Staines, if you regard that Dr. Jarvis speaks of the bequest which Lady Staines was enjoined to make to the Podmores, if she found them respectable, viz., some disposition in their favour, but not an entire disposition; that it could not be supposed that Lady Staines undertook, at all events, and under any circumstances, to leave the whole of the property, real and personal, to the Podmores; and that conclusion was strengthened by the consideration, as well as what was stated by those witnesses, as by the evidence of Miss Bridgers, in her answer to the 16th interrogatory, where she said that Lady Staines represented that all the property was her own, and at her own disposal.

And by the evidence of E. Flyn, who deposed to expressions used by Sir Thomas Staines on board the Isis, and which also shewed that great affection and confidence subsisted between Sir Thomas and Lady Staines; and by that evidence it was distinctly shown that other persons, besides the Podmores, were to be provided for.

Mr. R. H. Jones deposed that he was on confidential terms with Lady Staines, and that she consulted with the deponent respecting the will of her husband; and Lady Staines thought Sir Thomas Staines, by his will, had given every thing to her, subject to the payment of a few legacies; and when, in the month of July, 1831, he was employed by Lady Staines to make her will, he saw a copy of the will of Sir Thomas; and on that occasion he asked her the meaning of the words in the will, "Having a perfect confidence," &c., when she said that Sir Thomas meant that she should not give any part of the property to the Bridgers. He then spoke to the fact of the will of August, 1831, and the pecuniary legacies, and of the residue being given to the Bridgers; and said that the will was destroyed, and by that will £500 was left to each of the two plaintiffs; then he deposed as to Lady Staines having said that she had frequently heard Sir Thomas say he had two natural daughters, but that Sir Thomas had not imposed on her any obli-

gation or promise whatever that she should leave any thing to the Podmores, but that she had done it out of respect for Sir Thomas, and of her own free-will.

His Honour said there was certainly a contradiction in that part of the case, from the other evidence with regard to what took place between Sir Thomas and Lady Staines; but the real question was, whether it clearly appeared by the evidence whether that took place which was stated in the bill? It appeared to him by that bill, that there was a clear trust, let what might happen, that the Podmores were to have the residue: the true evidence, however, was, that some expressions had been used, by means of which the Podmores were to take some benefit; but it did not mean that they should have the whole residue, but Lady Staines was to exercise a discretion, and that the words deposed to by Dr. Jarvis—"if you find them respectable"—put it beyond a doubt that there was vested in her a discretion to act according to the communication made to her by Sir Thomas as to whether the Podmores should take, and what they should take.

In looking at the whole of the evidence, his Honour said he could not think that there was fairly a case which would warrant him in directing an issue: it appeared to his Honour that if, at law, they could make out a case, they would be entitled to relief; but that they had so completely failed in so doing, that he must dismiss the bill with costs.

Counsel.—The Solicitor-General, Mr. Jacob, and Mr. Turner, for the plaintiffs; Mr. Wigram and Mr. Duckworth for the defendant, Mr. Gunning; Sir W. Horne and Mr. Elderton, for the next of kin of Sir T. Staines; Mr. Knight and Mr. Teed for the heir-at-law of Sir T. Staines; Mr. Girdlestone, jun., for the heir-at-law of Lady Staines.

Authorities cited by the Vice-Chancellor.—*Sellack* v. *Harris*, 5 Viner, Abr. 521; *Walker* v. *Walker*, 2 Atk. 98; *Dixon* v. *Olmius*, 1 Cox, 414; *Muckleston* v. *Brown*, 6 Ves. 52; *Adlington* v. *Cann*, 3 Atk. 141; *Boyle* v. *Edwards* not reported, but mentioned in the argument in *Muckleston* v. *Brown*; *Stickland* v. *Aldridge*, 9 Ves. 516.

NOTE.—A portion of the facts of this case will be found in 5 Sim. 485; the case having been before the Court on a motion for a receiver, and for an injunction.

VICE-CHANCELLOR'S COURT.—June 1, 1836.

Croft *v.* Hawe.

Agreement not enforced on account of its being oppressive, and subservient to a Partnership Agreement which was at an end.

The principles laid down by his Honour the Vice-Chancellor, in *Kimberley* v. *Yeo*, *ante* page 1, were followed in this case, which was a demurrer to a bill for a specific performance of an agreement entered into by the plaintiff and his partner Miller (who were coffee and eating house keepers in the city of London) with the defendants, who were three sisters; and the agreement was to engage them as waitresses for three years, and if the gifts from the frequenters of the house did not amount to £150 a year, the plaintiff and his partner agreed to make up that sum. The plaintiff and his partner had power to discharge the defendants for grossly bad conduct, but not for any want of ability; and the defendants were restricted, during the term of three years, from setting up in the same business on their own account, or from entering into the service of, or marrying any person in the same line of business with the plaintiff, within half a mile round where the plaintiff carried on his business, under a penalty of £50. The defendants having, as alleged, misconducted themselves, were discharged, when they immediately set up business in the same street as the plaintiff; and it was alleged that the partner Miller assisted them with money, and otherwise in carrying on their business, and had refused to join the plaintiff in an action against the defendants, which deprived the plaintiff of his remedy at law.

His Honour having made up his mind, stopped the Counsel, and said that it appeared to him that the agreement which the defendants had been induced to enter into, was harsh and oppressive; containing provisions which ought not to have been entered into between persons situated as the plaintiff and defendants were. It appeared to his Honour, and as the plaintiff represented the case, that it was competent for Miller at any time to dissolve the partnership; and in fact, it is represented that there was a dissolution of partnership. The agreement with the defendants was subservient to the partnership, and the one being at an end, the other was no longer in force. The demurrer must therefore be allowed.

Counsel for the demurrer.—Mr. Jacob and Mr. Chandless.

Counsel for the bill.—Mr. Knight.

Case cited.—*Kimberley* v. *Yeo.*

June 3, 1836.

Tasker *v.* Small.

The Words in a Settlement to raise Money by "Mortgage, Annuity, or otherwise," authorises a Sale of a Reversionary Estate.

This case came before the Court in 1834, on demurrer to a bill filed for the specific performance of a contract. It was again

brought before the Court by Mrs. Small, on grounds not materia to be here stated.

The question was formerly argued by Mr. Treslove and Mr. Coote on behalf of the defendant: and the Vice-Chancellor overruled the demurrer. The case was this.

Arthur G. Small being entitled to certain property for an estate tail (subject to an estate for life and to a mortgage) by articles on his marriage, settled the property to certain uses therein mentioned; and by those articles he reserved to himself a power to raise, by "mortgage, annuity, or otherwise," on the estate in question, the sum of £15,000. Small afterwards mortgaged the estate (which was the equity of redemption) to Baker and Mann, with a trust for sale after default was made; and in consequence thereof, the mortgagees, in 1832, contracted to sell the premises, and Small by deed ratified that contract. The question was, whether the words "mortgage, annuity, or otherwise," in the settlement, authorised a sale? The estate tail was duly barred, and the legal estate vested in a person named Philips, who was a mortgagee with a power of sale.

It was contended that, as the interest of Small was reversionary, he could not raise the money unless he had a power of sale; for there was no income to pay the interest of the mortgage-money.

The Vice-Chancellor said that he had been shown no reason which would induce him to change his former opinion, (viz.) that Small had power to sell under the words of the settlement; for without that power the money could not be obtained. His Honour said that Mr. Jacob seemed to think it the duty of the tenant for life to keep down the interest: it was true the tenant for life was bound to do so; but that did not apply to the case of a tenant in tail in remainder, because there was no fund out of which he could do so; but he having a power to raise the £15,000 principal money, he should have it paid into his own hands. It appeared to his Honour that the estate having been mortgaged only, went to show that he had the power to raise the money by sale. He executed certain instruments by which he affected to convey the equity of redemption in trust to sell: certainly, if he adopted that kind of machinery, it was quite competent for him to do so, and to employ those mortgagees to make the contract for him; and if they made the contract, and he ratified it, it might be done. They do make the contract, and Mr. Tasker having got the contract, Philips is not willing to convey the legal estate to Tasker, but only desires, if he conveyed, that he should have competent authority for so doing; thereupon Tasker filed his bill, and the question was whether, in pursuance of the authority, the legal estate could or could not be sold?

His Honour thought that, under the words of the settlement, it was competent for Mr. Small to sell for the purpose of raising the whole of the sum. His Honour, however, thought it might be re-

ferred to the Master to ascertain whether the whole £15,000 had been raised, or what had been raised, and whether the power was properly executed or not, and whether the sum paid as purchase-money was a sufficient sum; and the Master was to state special circumstances.

Counsel.—Mr. Treslove appeared for Mr. Small; Mr. Jacob for Mrs. Small; Mr. Spence and Mr. Parker for the plaintiff Tasker; and Mr. Cooper for the trustees.

JUNE 8, 1836.

BRAHAM *v.* BOWES.

Receiver charged with Interest at £5 per Cent. for not paying in a Sum of Money.

This was a petition of a person named Bowes, praying that a Receiver should pay a sum of £362, together with interest thereon after the rate of £5 per cent. per annum, into Court; and that he should not be allowed his usual commission of £2. 10*s.* per cent., and that he should pay the costs of the application, and the costs of the proceedings before the Master.

It appeared by the affidavits of the petitioner, that the Receiver had received money on the 24th of January, 1832, and had never given credit for it; that he had passed his accounts, from time to time, without mentioning this sum; and that it had only been discovered by accident that he had that sum in his hands; that the money in question was purchase-money, and in 1833, the receiver had left his accounts in the Master's Office for the year 1832, on which occasion he returned the rents as due for that particular estate, and the accounts were passed *de anno in annum*, and in every account this sum was omitted to be mentioned.

It was stated in the petition, that the Receiver made interest.

It was contended for the petitioners, that the General Order of 1796 (which applied to Receivers passing their accounts,) did not give the Master jurisdiction to allow interest on any specific sum, but only applied to balances in Receivers' hands after passing their accounts; and in case they were not paid when they ought to be, the Master had power to charge interest, but that in the present case he had no power, which was the reason they made the present application, the Court having the power to do so; and it was contended, that the excuse which the Receiver made, (viz.) that he had forgotten that sum, ought not to be allowed.

For the Receiver it was contended, that this application was occasioned through a misunderstanding of the parties, and that the Receiver had passed his accounts to the amount of £100,000 without a single slip or irregularity having been made, with the exception of the present, which mistake was occasioned by forgetfulness; and that his receivership had been most beneficial to the estate; that £114 of the money belonged to the London Dock Company, who had never claimed interest. It was denied that the Receiver

had made any interest, or derived any benefit from the money, and that, at all events, (if he did pay interest,) there was no reason why it should be after the rate of £5 per cent.

The Vice-Chancellor said that this, in fact, was merely an appeal from the judgment of the Master. It appeared to his Honour, from what was represented in the affidavits, that there could be no imputation against the character of the Receiver; and it appeared to his Honour, that if a person placed in the situation of Receiver did by mistake omit to give credit for the money which he had received, that was no reason why he should not be charged with interest. The sum of £362 was received in 1832, and £114 of it belonged to the London Dock Company; application was made to the Receiver to pay in the money, which was duly complied with and paid in; the only question was, whether interest was to be charged in respect of the remaining £248?

His Honour was of opinion that interest ought to be allowed at the rate of £5 per cent. per annum, on the £248, from the time the Receiver received the money, till May last, at which time an offer was made to put the matter right. And that the present petition being in the nature of an appeal from the decision of the Master, his Honour must make the order without costs; and that as the petitioners, by filing their petition, had caused the trustees to appear, the petitioners were to pay the costs of the trustees.

Counsel.—Sir W. Horne and Mr. Lovat for the petition; and Mr. Knight and another gentleman for the Receiver; and Mr. Phillimore for the trustees.

ROLLS' COURT.—April 27 and 28, 1836.

Clementson *v.* Gandy.

Parol Evidence not admitted to contradict the written Intention of a Testatrix, as to which Deed she intended to confirm.

Mrs. Savage (being entitled to considerable property) entered into a covenant contained in an indenture of the 30th Sept. 1816, whereby she covenanted with trustees (two of whom, the survivors, were plaintiffs, viz., Thomas E. M. Turton and Richard Turton,) that her heirs, executors, or administrators, would, at the end of six months after her decease, pay the sum of £6000, upon trust for the plaintiff John Clementson.

In October, 1817, Mr. Clementson having contracted a marriage with a daughter of Sir Thomas Turton, Bart., Mrs. Savage executed an indenture bearing date the 14th day of October, 1817, which recited the intended marriage—the indenture of the 30th of September, 1816—and that Mrs. Savage, in consideration of that deed having been delivered up to be cancelled, had transferred into the name of herself and trustees, T. E. M. Turton and Richard Boodle, the sum of £9682. 6s. three per cent. consols. It

was therefore agreed that Mrs. Savage and the trustees should stand possessed of that sum, upon trust for Mrs. Savage for life; and after her decease, in trust for Mr. and Mrs. Clementson and their children in manner therein mentioned.

The indenture of the 30th of September, 1816, was delivered up to Mrs. Savage, but it was not known whether she cancelled it or not; but it could not be found after her death.

Mrs. Savage, by her will dated the 23rd of October, 1832, provided as follows:—"I do hereby ratify and confirm a certain indenture bearing date the 30th December, 1816, made between," &c. (stating the names of the parties, and reciting the deed.) "And I direct my executors to pay the said sum of £6000 according to the tenor, true intent, and meaning of the said deed of covenant." And the said testatrix devised all her freehold, copyhold, and leasehold estates to the Rev. Samuel Whitlocke Gandy, the said Richard Boodle, and the Rev. J. W. S. Powell, upon trust, to sell, and apply the produce upon the trusts therein mentioned; and she appointed the said last-mentioned trustees to be her executors.

It is to be observed, that the testatrix referred to the indenture of the 30th of September, 1816, as bearing date the 30th of December, 1816, though in other respects the recitals appear to be correct.

Mrs. Savage derived the greater part of her property from her first husband, Thomas Ayliffe, amounting to £70,000; and the plaintiff, Mr. Clementson, was almost the nearest of kin to Thomas Ayliffe, and Mrs. Savage was greatly attached to Mr. Clementson.

Mrs. Savage's will was drawn by making copies of an old will and a codicil; and by the old will the deed of the 30th Sept. 1816, was also confirmed.

This bill had been filed by John Clementson and the trustees of the indenture of September, 1816, against the trustees and executors of the will of Mrs. Savage, praying that the defendants might be decreed to pay for the benefit of John Clementson the sum of £6000 in respect of the said legacy, together with interest for the same from the date of one year from the death of the testatrix.

The defendants admitted the estate to be sufficient to pay the legacies. The defendants produced evidence to show that the testatrix meant to confirm the deed of the 14th of October, 1817, instead of the indenture of September, 1816; and that evidence was as to the state of her property, and as to the instructions given to her solicitor, Mr. John Coles Symes, in preparing the will; and her banker's book was produced, in order to prove the amount of property which the testatrix considered herself to be possessed of when she gave those instructions, and in order, as she expressed herself in the letter to her solicitor, "that the Clergy Education Society may not be a residuary legatee only in name." A letter of Mr. Symes to the testatrix was also produced, which stated his opinion (after having explained the amount of the property,) that

there would be a considerable deficiency; and it was stated that she made the will on the belief that her property consisted of the particulars mentioned in the last-mentioned letter, and on the belief that she was empowered to bequeath the whole of the £9682. 6*s*. three per cent. consols which had been settled by the indenture of the 14th of October, 1817. And it was attempted to show that, at the time the testatrix made her will, she was ignorant of being possessed of the reversion of a real estate of considerable value; and they submitted that if Mr. Clementson had a claim to the £6000, that he was bound to elect.

For the plaintiffs it was contended, that the defendants could not produce evidence in contradiction to the intention expressed in the will; and that even if they could, the evidence produced did not prove that the testatrix meant to refer to the indenture of the 14th of October, 1817, or that he was not to have the £6000.

For the defendants it was contended, that though you could not give evidence of the whole amount of the property of the testatrix, you could as to a particular part, and how she meant to deal with it. And that the evidence showed that she intended to refer to the indenture of the 14th of October, 1817, and that the plaintiff, John Clementson, was not to have the £6000.

The Master of the Rolls, in giving judgment, said that the parol evidence was not receivable; the defendants wished to prove that the testatrix thought certain property belonged to her, which in fact did not: in all cases, the intention to dispose of property was to be collected by the will, and that only. You might look to external circumstances to make expressions used intelligible, but the intention to dispose must appear by the will itself; therefore it was not admissible in the present case, because here it is wished to introduce it to show the intention of the testatrix to dispose.

His Lordship therefore decreed that, in addition to the sum of £9682. 6*s*. three per cent. consols, the sum of £6000 should be paid to the plaintiffs, with interest on the latter sum, to be computed from twelve months after the testatrix's death; and the costs of all parties were to be paid by the executors out of the testatrix's estate.

Counsel.—For the plaintiffs, Mr. Pemberton and Mr. Stuart.
Solicitors.—Messrs. Young and Vallings.
Counsel.—For the defendants, Mr. Kindersley and Mr. Painter.
Solicitors.—Messrs. Teesdale, Symes, and Weston.

May 3, 1836.

Barnett *v.* Grafton.

Practice.—31*st Order of* 1828, *Construction of.*

In this case the bill had been filed against certain persons who were supposed to have been present at a meeting held on the 25th of August, 1834, respecting a Soap Company, about to be estab-

lished at Birmingham. One of the defendants (Welsh) put in a plea in bar to the whole bill, that he was not present at the meeting on the day above mentioned, or at any other meeting. This plea was filed on the 27th of February, 1836, and was set down by Welsh on the 21st of March, and was in the paper on the 24th. On the morning of the 24th, the plea stood over, by consent, to the 26th. On the afternoon of the 24th (the day originally appointed for arguments,) the plaintiff filed his replication. On the same day, Mr. Pemberton applied, on behalf of the defendant, for the costs of the plea; but the question was ordered to stand over till the 26th. The plea was not called on till the 28th. It was then contended for the plaintiff, that the costs were reserved under the 31st Order of 1828. On the other hand, for the defendants, it was contended that the plaintiff ought to pay the costs of the plea, under the words of that order, which it was said meant that the costs of the suit should be reserved, and not the costs of the plea.

The MASTER OF THE ROLLS ordered the plaintiff to pay the defendant the costs of the plea.

The Order, as given out by the Registrar, was "Let the plea be allowed, and let the plaintiff pay the taxed costs thereof."

The plaintiff afterwards gave notice of motion to vary the minutes as follows:—"The plaintiff having filed a replication to the plea put in by the defendant Joseph Welsh to the plaintiff's bill, after the said plea had been set down for argument, let the said plea stand over, and let the plaintiff pay unto the said defendant his costs of the setting down the same, and of this day's appearance."

On the 3rd day of May, 1836, it was contended, on the part of the plaintiff, that the plea was allowed by the filing of the replication, and not by the Court; it was therefore unnecessary for the Court to allow it; that no argument of the plea actually took place; that he had a right to have the order drawn up to that effect; and that he ought not to pay the costs of the plea, because it was not argued, and because he might possibly falsify it, and succeed in the suit as against the defendant; and yet, under the Order as given out, the plaintiff would then have paid the defendant the costs of the plea, which in fact now stood as an answer. The plaintiff also contended that the plea ought to stand over, because it had not been argued, and would come before the Court on the question of fact put in issue by it.

For the defendant it was contended, that the plea was allowed as much or more by the Court, than the filing of the replication; that the case was ordered to stand over by consent before the replication was actually filed; that the argument was merely dispensed with by reason of the replication; but that the Court still had to deal with the plea, and that the plaintiff could not come at the last moment and take the plea as it were out of the hands of the Court; and that if the practice was to let the plea stand over,

the plaintiff might again call the plea in question. In fact, a motion for leave to withdraw the replication and amend was pending, and he might, by amending, make out a new case against the defendant, and wholly do away with the benefit derived from the plea.

The MASTER OF THE ROLLS said that he did not see any reason for altering his former order; he should therefore refuse the application, with costs.

NOTE.—The Registrar stated to the Court that he had looked into the books, but could not find any case like the present, and that he never remembered a case where the replication had been filed on the very day appointed for argument.

Counsel for the plaintiff.—Mr. Kindersley and Mr. Webster.
Solicitors for the plaintiff.—Messrs. Alexander and Co.
Counsel for the defendant.—Mr. Pemberton and Mr. Piggott.
Solicitors for the defendant.—Messrs. Woodrooffe and Lewin.

See this case shortly reported, *ante*, p. 43, when the question first came before the Court.

VICE-CHANCELLOR'S COURT.—MAY 27, 1836.

MITCHELSON *v.* PIPER.

Administration of Assets—Application to make Creditors refund, who had been paid in part.

A testator died possessed of real and personal estates, and indebted to several persons. His executors paid some of the creditors a portion of their debts out of the personal estate. The creditors who remained unpaid, then filed their bill to administer the estate of the deceased, and obtained a decree. It appeared, on reference to the Master, that the personal estate was insufficient to pay the creditors in full; and the question was, whether those who had been paid in prats, should not bring what they had received into hotchpot, so that the whole fund might be equally distributed, and in order that each creditor might prove his debt as it existed at the testator's death?

The VICE-CHANCELLOR said there could be no doubt that, when a creditor came in to prove his debt before the master, he was bound to prove it as it existed at his debtor's decease; and whatever amount he had received from the executors, he was compelled to admit as a payment of so much of his share, which would have the same effect as bringing what he had received into hotchpot, but with the advantage of not making him refund.

Counsel.—Mr. Bethell, for the unpaid creditors; Mr. Wright, for the creditors paid in part; Mr. Sidebottom, for the executors; and Mr. Jacob and Mr. Wigram, for other parties.

JUNE 3, 1836.

LATOUR *v.* HALCOMBE.

Demurrer to a Bill filed by a Bankrupt against his Assignees and the Purchaser of his Estate, to set aside a Sale, overruled.

Demurrer by an Executor to a Bill of Revivor for not setting out enough of the Original Bill, also overruled.

This was a bill filed by Colonel Latour, who was a bankrupt, and had not obtained his certificate, against his assignees and a purchaser of his estate.

The plaintiff, Colonel Latour, was entitled, under his father's will, and under the settlement made on his marriage, to considerable property, both real and personal. He afterwards conveyed his property to trustees in trust to sell, and then pay off the incumbrances thereon; and after payment thereof, to hand over the surplus to the plaintiff.

In August, 1829, the plaintiff first executed a security to Halcombe, who lent him money. In 1829, a commission of bankruptcy was issued against the plaintiff; and in September, 1830, the assignees sold a portion of the plaintiff's estate to the defendant Halcombe, and it was alleged that it was worth £8000, and they sold it for £400. In 1830, a meeting took place for the purpose of superseding the commission. At that meeting fifty-two out of fifty-six persons, who were the whole of the creditors, signed their consent to supersede the commission, amongst whom were the assignees; a few other creditors, who afterwards proved, were also satisfied. It was alleged that, on the 10th of August, 1831, there was a meeting for the purpose of consenting to the sale of the property, and that, out of the fifty-six creditors, ten only attended to consent, and that six out of those had previously signed their consent to supersede the commission. The bankrupt did not obtain his certificate.

For the bill, it was admitted, that an uncertificated bankrupt could not file a bill against his assignees; but that, in this case, it was a bill filed by a person who, by the proceedings which had taken place, had placed himself in a position to treat with his creditors to restore him to his rights. And it was alleged, that the bankrupt was treated as the owner of his property by certain orders of the Court made in the bankruptcy; amongst others, one in which he was ordered to ratify a sale of his furniture, which had been contracted to be sold. And it was further alleged, that Halcombe was permitted by fraud to file a bill against the assignees, and that they had made no defence, and permitted him to obtain a decree against them without making the plaintiff a party.

The Vice-Chancellor having here expressed his opinion that, if the facts were true which were stated in the bill, relief could not be had anywhere but in a court of equity; the counsel for the plaintiff, thereupon, sat down.

For the demurrer it was asked, if a case was ever known in

which an uncertificated bankrupt had come into a court of equity, and set aside a contract by his assignees?

The Vice-Chancellor.—In this case all the creditors are satisfied.

It was further contended, that if there was a charge of fraud, there would be a jurisdiction for the Court of Bankruptcy to deal with the assignees, *Hammond* v. *Attwood;* that it was still a valid subsisting commission, and that any subsequent creditors might come in and prove. If the bankrupt had simply presented a petition to the Court of Review, verifying the invalidity of the commission, he might have obtained a *supersedeas;* and if he could not obtain that, he could get an order to have the assignees removed, and proper persons appointed. If he had obtained a *supersedeas*, he might then have filed his bill.

Vice-Chancellor.—He has satisfied all the creditors, (that is) they have consented to the *supersedeas*, or their claims have since been settled; and the persons who last proved under the commission, had also been satisfied; and that being so, though the commission was not superseded, yet it did not appear to his Honour there was any jurisdiction in the Court of Review to grant relief: that was the point. There was nothing to show that, where there was no creditor, and the bankrupt was alone entitled, that the Court of Review could set aside the contract. His Honour wished to know what original jurisdiction the Court of Bankruptcy had to interfere with a person who had not submitted to its jurisdiction, such as the defendant Halcombe? His Honour said that it was not shown that the Court of Review had any jurisdiction.

The Vice-Chancellor, in giving judgment, said it appeared to him, if what was represented in the bill was true, (and he was bound to receive it as truth,) that it was a case of the most abominable fraud, and that it was a case in which (as the bill represented,) the courts of equity had been made instruments by which that fraud has been perpetrated against the person against whom the commission has been issued. It is represented in the bill, that there were no creditors, who had proved, whose debts had not been satisfied. The bill was filed against the parties who committed the fraud, seeking for relief. The question was as to the jurisdiction of the Court. It appeared to his Honour that the bankrupt could not obtain relief in the Court of Bankruptcy, because that Court had no power or jurisdiction over Halcombe and other persons, who were not subject to the jurisdiction; this appeared to his Honour quite enough to justify his coming into the Court of Chancery for relief; the demurrer ought therefore not to be allowed.

The reason for the demurrer to the bill of revivor was, that the bill assigned no ground against the defendant, against whom the bill was sought to be revived. The bill stated, that a term was assigned to P. Davis; but it did not state that it was vested in P. Davis's executor. It then set forth the prayer of the bill. This was

demurrable; for it was held, in the case of *Phelps* v. *Sproule*, you must, in the bill of revivor, state so much of the case as will show that you have an equity to revive.

The Vice-Chancellor.—The bill alleged the fact that the leaseholds, which were assigned to P. Davis, are now vested in the defendant as his executor.

Counsel.—The decision in *Phelps* v. *Sproule* is, that the bill of revivor must show an equity against the defendant; they have not stated any circumstances by which they are entitled to any relief against the defendant.

On the other side it was asked, what could be more mischievous than that the matter stated in the original bill should be stated over again?

The Vice-Chancellor said that P. Davis appeared and filed a demurrer, which admitted the facts stated in the bill to be true; the person who was his executor, demurred to the bill of revivor. The bill of revivor alleged that that person was the executor of P. Davis, and the demurrer to the bill of revivor admitted this; it must therefore be overruled.

Counsel.—Mr. Knight and Mr. J. Russell for the demurrer, and Sir William Horne and Mr. Cole for the bill.

Cases cited.—As to the bankrupt's filing a bill against his assignees, *Hammond* v. *Attwood*, 3 Mad. 158; *Spregg* v. *Binkes*, 5 Ves. 583; *Benfield* v. *Solomons*, 9 Ves. 84.

As to the bill of revivor, *Phelps* v. *Sproule*, 4 Sim.

June 1, 1836.

Powys *v.* Mansfield.

Infant, on coming of Age, no longer allowed to show Cause against a Decree made during his Infancy.

The question in this case was, whether an infant had a right, on his attaining the age of twenty-one years, to show cause against a decree made during his non-age.

The Vice-Chancellor said that he had mentioned the case to the Lord Chancellor and the Master of the Rolls, and they were of opinion with himself that the obvious intention of the statute of 11 Geo. IV. and 1 William IV. c. 47, was to abolish the parol demurring; and, by a natural consequence, that the six months, hitherto reserved in decrees, should be no longer given to infants.

It had been very properly remarked by Mr. Jacob, that it was not a general proposition in equity to give infants six months to object to a decree; and that that period was given in those cases only where it would have an effect, in similar operation, to that of the parol demurring in the analogous case at law. His honour then referred to the 10th and 11th sections of the act of William IV., and observed that the former section enacted, that the parol should no longer demur; and the latter section enabled courts of equity, in cases of suits for the payment of debts, to carry their decrees

into effect, by compelling infants to execute conveyances of real estates. It was clear, then, the meaning of the statute was, that, where a decree affected real estates, if the Court thought right to make a decree, it could follow it up by compelling the infant to convey. The saving, therefore, of the six months, was virtually abolished. Now, in this case, the decree was not actually pronounced till after the infant had attained twenty-one: that was a matter of fact. Now, in not one of the cases which had been cited, was the application made after the decree was made absolute; but it was either made during the infancy, or after the party had attained twenty-one, and before the decree was made absolute. In this case, both those circumstances were wanting. His Honour was therefore of opinion, that neither the state of the law, nor the circumstances of the case, justified the application, and that it must be refused, with costs.

Counsel.—Sir C. Wetherell and Mr. Jacob.

Case referred to.—*Kelsall* v. *Kelsall*, 2 M. & K. 409, where will be found all the cases on the subject.

JUNE 1, 1836.

MASTER *v.* GARDINER.

An Erasement of a Name in a Will is not a Revocation of the Bequest, providing a sufficient Description remains.

A testator bequeathed legacies to his sister, by the description of "Eliza Bately, the wife of Francis Bately." Some time after the execution of his will, he erased with a pen the words "Eliza Bately," and suffered the remainder of the description to stand. The question was, whether the testator did not intend an absolute revocation of the bequest? His Honour considered that, whatever might have been the intention of the testator, he had not done enough to amount to a revocation of the bequest, and that a sufficient description of the legatee still remained in the will.

ROLLS' COURT.—MAY 29, 1836.

GOODHAUGH *v.* BURROWS.

Construction of the Words in a Will, "if my Wife shall depart this Life," as to what period it refers to.

This was a question on the construction of the will of a testator, who, after directing the payment of all his debts, and giving to his wife certain leasehold property, gave all the residue and remainder of his property on this express condition: that she was to support, maintain, and educate, all his six children, until they were capable of getting their living by service or apprenticeship; and, in case his wife should depart this life, he gave all the property she should die possessed of to be equally divided between his children, share and

share alike, when they should attain twenty-one respectively. The testator died in March, 1798, possessed of real and personal estate, and left his widow and six children him surviving. The widow educated the six children, and in 1836 died, having made a will.

The children then filed a bill against the persons taking under the will, insisting that the widow was only tenant for life, and that the plaintiffs, her children, were entitled, on her death, under the will. To this bill, the defendants demurred.

It was contended, for the demurrer, that the testator meant to give his wife the property absolutely, with a condition that, on her death before all the children attained twenty-one, she was to give the property to all his children, and that the event was contingent; and the time contemplated for the contingency to happen, was her death before the children attained twenty-one.

For the bill it was contended, that the testator's intention might be, that she should take all the property, and be bound to give it amongst all her children; that where there were words of contingency, such as in case of the death of a person, the Court looked to find some period for the death. It was generally held to mean the death in the lifetime of the testator. It could not mean in this case the widow's death before the children attained twenty-one, because the testator talked of apprenticeship; and it could not mean in case his wife died before the testator, because he says "her property;" but that the gift to her was on condition, that she should give it to all the children, and that, not having done so, all the property went to the children on her death.

The Master of the Rolls said it was impossible to put a true construction, unless the whole context of the will was considered. In this case, the testator could not refer to his own death; and, in regard to the other point, where it was said to refer to the widow's dying before the children attained twenty-one, if that was the case, the words "to be equally divided, share and share alike, when they should attain twenty-one," would have this effect, (viz.) if all the children but one attained twenty-one, they would all be excluded but the one who remained under twenty-one; and that child would have the whole on attaining that age.

The counsel for the demurrer again contended, that this was an absolute gift to the wife, subject to a certain condition to go over, if she died before the children attained twenty-one.

The Master of the Rolls said he had no doubt on the subject. The testator gave certain leaseholds to his wife; then he gave all the residue of his estates, both real and personal, on the express condition that she should support, maintain, and educate, his six children until they were capable of getting their living by service or apprenticeship; then he came to the words "in case my said wife should depart this life," (which must happen some time or other,) then he gave and bequeathed all the property she should die possessed of to all his children when they attained their age of

twenty-one years. Under these words the point arose; they were words of contingency, because her death might happen at any period; the Courts therefore endeavoured to discover when that period was to be, in which he intended the property to go over. It might possibly happen, that she should die before the condition was performed; because it was to be divided between the children on their attaining twenty-one. If the words had been, on her death, the other construction would have prevailed, (viz.) her taking a life estate; but by the words, "I give and bequeath the property she may die possessed of," she had a power of disposition in her lifetime, and such a controul over the property, as to give her an absolute interest. On that ground, the demurrer must be allowed.

Counsel.—For the demurrer, Mr. Pemberton and Mr. Chandless; for the bill, Mr. Kindersley.

Cases cited.—*Smart* v. *Clark*, 3 Russ. 365; *Billings* v. *Sandom*, 1 Bro. C. C. 394; *Tilson* v. *Jones*, 1 R. & M. 553.

LORD CHANCELLOR'S COURT.—May 7, 1836.

Attorney-General *v.* Lubbock.

Construction of the 62nd of the Amended Orders of 1828.

The question in this case was, how much a defendant could be charged for a copy of accounts entered in the Master's Office. The accounts were very extensive, and had been entered in the book in the Master's Office, but not appended as a schedule to the report.

The Lord Chancellor had consulted the Master of the Rolls and the Vice-Chancellor, and those Judges agreed with him, that, under the orders referred to, accounts so taken, and not appended to the report, were to be charged at the price of 6*d.* per folio only. The report was to be charged 2*s.* per folio; but the accounts, when copied from the Master's book, to be only 6*d.* per folio.

VICE-CHANCELLOR'S COURT.—June 8, 1836.

Brickwood *v.* Harvey.

Demurrer to a Bill for not making a Company parties.—Construction of the 1 & 2 *W. IV. c.* 24, *for lending Exchequer Bills to public Companies.*

This was a demurrer for want of parties, and for want of equity.

By the 1 & 2 W. IV. c. 24, and other previous acts of parliament, the Exchequer Loan Commissioners are empowered to advance Exchequer-bills to any company engaged in works of a public nature.

In the present case, the Commissioners advanced Exchequer-bills to a canal company, to the amount of £50,000, for the purpose of completing the canal. The directors paid £10,000 of these Exchequer-bills in payment of a debt; this, the plaintiffs contended, was a fraudulent application of the bills, as the directors were bound to apply the whole in completing the works; the company having made default, the Commissioners took possession, under the act, of the whole property of the company.

This was a bill filed by the plaintiff, who was the secretary of the Exchequer Loan Commissioners, against several defendants, directors of the canal company, and against others, for the purpose of making them account for the produce of the sale of the Exchequer-bills to the amount of £10,000.

For the demurrer it was contended, that the canal company ought to have been made parties.

His Honour thought so too; but he would hear the other side.

For the bill it was contended, that if the company were made parties, it would be a good ground for demurrer, as it was impossible to bring them before the Court.

The Vice-Chancellor.—Suppose you are entitled to the relief sought for, that will have the effect of paying £10,000, part of the debt; has not the company, therefore, an interest to sue you, and obtain relief, on payment of the remainder of the debt?

Counsel.—The company stands neuter at present; but that question may be considered when the account is to be taken. Besides that, we have, under the act, an absolute power to take all the property of the company.

Vice-Chancellor.—That is the point; whether, if the secretary of the commissioners takes possession of the property, he, *ipso facto*, obtains an indefeasible possession.

Counsel.—We may take absolute possession; but the 22nd section of the 1 & 2 W. IV. c. 24, enables us to relinquish the property if we like. You never can be bound to make a party of those whom you cannot bring before the Court.

The Vice-Chancellor.—The 21st section of 1 & 2 W. IV. c. 24, empowers the commissioners to enter after default, and retain possession, or to lease or sell for repayment of the loan. It appears to me that the act meant to give absolute powers to the secretary of the commissioners when he took possession, to obtain repayment; but it did not say that the company could not redeem by paying the debt before the sale. I will put the case, that the commissioners are in possession, and the company produced the whole principal and interest; the question is, if the commissioners wont give up the property, can the Court compel them to do so; ought not, therefore, the company to be made parties?

It was again urged, that there was no means of compelling them to appear, because they had no property; for you could not proceed

against a corporation not possessing property; and you cannot attach them, but must proceed by *distringas:* the 1 W. IV. c. 36, s. 3, does not apply to them.

Vice-Chancellor.—That certainly cannot apply, because a corporation has no residence.

Counsel.—They are in the same situation as a bankrupt, where a bill is filed against his assignees.

Vice-Chancellor.—In the 1 & 2 W. IV. it is provided, that the secretary may appoint some person to manage the property till the debt is paid. This shows that it was intended not to give the absolute property to the commissioners, but only the means of obtaining the debt.

Counsel.—The whole property being vested in the commissioners, together with all the corporate rights, they can certainly sue these persons for the breach of trust, without making the company parties.

Vice-Chancellor.—At this present time, the company have a redeemable mortgage.

Counsel.—This is not like a common mortgage, because it is done under a particular act of parliament. The several acts of parliament made for this purpose, provide the most effectual means for securing the repayment of the loan from persons who are not in a condition to repay the money. By each act of parliament, the powers of the commissioners are increased, till, by the last act, they are enabled to take absolute possession on default.

Vice-Chancellor.—You now mean to say, that the secretary of the commissioners has an irredeemable right as against the company.

Counsel.—I mean to say it is irredeemable, and that the company is at an end.

Vice-Chancellor.—It appears to me, by the language of the act of 1 & 2 W. IV., that, during the time the secretary is in possession, it is for the purpose of obtaining repayment: it followed, that, if the company could raise money, and tender it, that the commissioners would be bound to give up the property; and that, if they refused, and the company were to file a bill against Brickwood, and state they were ready to pay the £50,000, and interest due, that he would be bound to re-establish them in their rights.

Counsel.—Supposing they don't do so.

Vice-Chancellor.—I don't imagine that they would; I only say, that according to the construction of the act, that the company might do so.

His Honour, in giving judgment, read the different sections of the act, and said that it appeared to him as plain as language could make it, that by the authority given by the act (which was very extensive,) the secretary had merely those powers for the purpose of compelling payment of the debt; and when paid, the property again belonged to the company. It did not appear to his Honour

that it was the intention that, to all intents and purposes, during the possession by the secretary, that the company were to be considered as no longer existing: whatever difficulty there was in making the company parties, must be dealt with at a future period. At present, it appeared to his Honour that this demurrer must be allowed, on the ground of want of parties. He wished, however, to be understood to decide in favour of the demurrer on the ground of want of parties; but his opinion was against the defendants on the other grounds, (viz.) for want of equity. And his Honour declared the plaintiffs to be at liberty to amend the bill by adding parties. He must give the costs, if he allowed the demurrer.

Mr. Knight said he would attend to the hint of his Honour, as to his opinion that the equity was against them.

Counsel.—Mr. Knight and Mr. Turner for the demurrer, and the Solicitor-General and Mr. Cole for the bill.

ROLLS' COURT.—May 29, 1836.

Lord Sidmouth *v.* Lady Sidmouth.

Merger of a Charge in the Freehold, where the Owner, before his Death, was unable to express his Intention; and it did not appear to be for his Benefit to keep it up.

This was a demurrer to a bill filed by the persons who represented both Lord Stowell and his son, Mr. Scott, for the purpose of having certain charges on the real estate raised.

John Bagnall, Esq., on the marriage of his two daughters, (one of whom married Lord Stowell, then Sir W. Scott, and the other to the Honourable Captain Windsor,) executed to trustees two several bonds for payment of £9400. These bonds were settled as to one of them, in trust for Captain and Mrs. Windsor, and their family; and in case there were no children, (which was the case,) then in trust for Lady Scott, for life; and after her death, in trust for all her children: the shares of the sons to be vested at twenty-one, and of the daughters at that age, or marriage, with benefit of survivorship between them. The trusts of the money secured by the second bond, were for Lady Scott, for life; then to Lord Stowell, for life; then amongst the children, as the survivor should appoint; and, in default of appointment, to all the children in equal shares; the sons at twenty-one, and the daughters at that age, or marriage.

Mr. Bagnall, by his will, made in 1797, directed that the two sums of £9400 should be raised by the trustees out of his real and personal estates; and he directed the whole of his estates should be applied for that purpose. He then devised all his real and personal estates to his sons-in-law, Sir W. Scott and Captain Windsor,

in trust, as to one moiety thereof, to Lady Scott, for life; and, in case she should die in the lifetime of Lord Stowell, leaving issue, then in trust for Lord Stowell, for life; provided any issue of the said A. M. Scott "should so long live;" and, after the death of the survivor of Lord Stowell and Lady Scott, then in trust for the sons of Lady Scott, as Lord Stowell and Lady Scott should appoint; and, in default of appointment, in trust for the sons of Lady Scott, as tenants in common; and if but one, in trust, for that one.

And the other moiety was limited in trust for Captain and Mrs. Windsor, and their children, in manner therein mentioned; and, in case they should have no children, then in trust for Lady Scott, for life; then to Lord Stowell, for life; provided any issue of the said A. M. Scott should so long live; and, afterwards, to the children in the same manner as the other moiety was limited. By a codicil to the will, it was provided, that, in case Mrs. Windsor survived her sister, she was to have the rents, &c. of the whole of his estates during her life.

Mr. Bagnall died in 1803, leaving his two daughters him surviving. Lady Scott had two children, (viz.) William Scott, and Marianne Scott, who married Lord Sidmouth.

Lady Scott died in 1809.

Captain and Mrs. Windsor both died in 1832, without having had issue.

Mr. Scott died in 1835, intestate, and without issue; and Lord Stowell died in the present year.

Lord and Lady Sidmouth are both living.

Lord Stowell was some time, previous to his death, in a state of mind which rendered him incapable of making a will.

The question was, whether the two charges could be raised?

For the demurrer, it was contended, that the charge would merge, unless it was shown to be for the benefit of the party having the charge and the estate; as in the instance of an infant possessed of lands, and a charge upon them, who could bequeath the charge, and not devise the estate. And it was contended, that, according to the rules laid down by Fearne, in his book on contingent remainders, that Lord Stowell was owner in fee.

The Master of the Rolls.—He had an estate capable of being determined by the death of another life.

For the bill it was contended, that Lord Stowell, under the terms of the will, certainly had not an absolute interest in the estate, though he had in the charge. That, on the death of Mrs. Windsor, Mr. Scott had a right to have the charge raised out of the estates, as to one moiety of the bonds; and it was then his interest to have had it raised, because it was out of his father's estate. On Mr. Scott's death, the reversion in fee devolved on Lady Sidmouth; and Lord Stowell was then only tenant for the life of Lady Sidmouth, and this estate was subject to be defeated by her death in his lifetime. The consequence was, that he was not the absolute

owner of the estate. Lady Sidmouth had no issue, but she might have had issue; and she could also have given the property by will. Another ground for keeping the charge alive was, that Lord Stowell could have passed the charge by will, but could not have done so with the real estate, as he had no interest beyond his life.

The MASTER OF THE ROLLS, in giving judgment, said this was a case of demurrer which involved the following question:—Lord Stowell, if he survived his wife, Lady Scott, and there was issue, was entitled for life to certain estates, with remainder to Mr. Scott. The estate of Lord Stowell was subject to a determination, on failure of issue of A. M. Scott. The same real estates were subject to two pecuniary charges of £9400, to which Lord Stowell was entitled for life, and Mr. Scott was entitled, subject to his father's interest. W. Scott died intestate, and Lord Stowell became entitled to the charges for his own use. The remainder in the real estate became vested in Lady Sidmouth, subject to the estate of the tenant for life, determinable on her death. Lord Stowell died in 1836, intestate, having, in the interval, been in a state of mind rendering him incapable of disposing of his property. The plaintiffs were his representatives, and the bill was filed for the purpose of having the charges raised.

His Lordship said that the general rule was, that where the owner of the charge was entitled to the fee, and, in the absence of any intention to the contrary, the personal representatives could not have the charge raised, but where the party was incompetent to show his intention, then the charge should merge, unless it was shown to be for the benefit of the party to keep it on foot. In this case, Lord Stowell, having been incapable of expressing his intentions on the subject, the charge will therefore merge, unless the Court could see that it would be more for his advantage to preserve it. In this case, the party being incompetent to form an opinion on the subject; and it not appearing that it would be most for his benefit, that the charge should be kept up; it must therefore be considered as extinguished, and merged.

Counsel.—Mr. Kindersley, for the demurrer; Mr. Pemberton, for the bill.

Cases cited.—*Chester* v. *Willes*, Ambl. 246; *Wyndham* v. *Earl Egremont*, Ambl. 753; *Lord Compton* v. *Oxenden*, 2 Ves. jun. 261; *Astley* v. *Milles*, 1 Sim. 298; *Forbes* v. *Moffatt*, 18 Ves. 384.

VICE-CHANCELLOR'S COURT.—June 7, 1836.

JENKINS *v.* BRIANT.

A voluntary Covenant by a Testator to secure an Annuity, is binding against his Devisee.

The question in this case was argued before the Court on exceptions to the Master's report, it having been referred to him to take an account of a testator's debts.

A covenant had been entered into by the testator, on the marriage of his daughter, and, in consideration of natural love and affection, to pay an annuity of £100 to his son-in-law during his (the son-in-law's) life; and this annuity was charged on a particular estate.

The testator afterwards, by his will, devised the particular estate to his widow, subject to the charges thereon; and he also devised other real estates, not subject to the charge.

The estate upon which the annuity was charged, had been sold, and the purchase-money paid into the Court of Exchequer, in a suit instituted there for the administration of assets; the Court of Chancery not having conusance over that fund, the only relief, therefore, for the annuitant was through the medium of the covenant.

The testator did not leave sufficient personal estate to pay his debts. The devise took place before the late statute of fraudulent devises, 1 W. IV. c. 47.

The question was, whether the devised estates, not made subject to the debts by the testator, were chargeable with the annuity under the statute of fraudulent devises, 3 & 4 W. & M. c. 14.?

In support of the exceptions, it was not denied that the particular estate was liable; but there was no reason why the whole estate should be liable; that it was a specialty debt by voluntary covenant, and that the covenantee could not come in competition with simple contract creditors who had exhausted the personal estate; consequently the bill must be dismissed, so far as they were creditors upon the testator's real estate; that, under such a covenant as the present, an action of debt could not be maintained; consequently the statute of fraudulent devises would not apply; and that there were no estates out of which these debts could be made payable.

It was further contended, that there was no distinction between this case and the case of *Farley* v. *Briant*, and that the question never came before the Court except in that case.

Contrà.—It was contended, that if this covenant could not be enforced against the devisee, that in every case where a person granted a common annuity, he might defeat the annuity on his death by devising the property; no conveyancer, in drawing such a deed, ever doubted but that it could be enforced against the

devisee. Before the statute of fraudulent devises, of W. & M., the action of debt could only be brought against the heir; and the statute was intended to put the devisee in as similar a situation as the heir in the case to which it applied.

The VICE-CHANCELLOR.—The question arises in this case, whether, if a party covenants to pay a sum of money *de anno in annum*, an action of debt can be maintained against his devisee? In the case of *Wilson* v. *Knubley*, there was an attempt to make the devisee liable, in an action of covenant for title, where the matter was quite contingent, and, in that case, it was held that it would not do; for the 3rd section of the statute of fraudulent devises only gave a remedy where there was a debt due from the testator at the time of his death.

It appeared to his Honour, if it were a covenant to pay money each year, as in this case, an action of debt might be maintained upon such a covenant as well as an action of covenant.

Counsel.—Mr. Jacob and Mr. Campbell, for the plaintiffs; Mr. Wigram, Mr. Anderdon, and Mr. Cooper, for the defendants; Mr. Duckworth, for the heir-at-law; Mr. J. Parker, Mr. Wood, and Mr. Koe, for other parties.

Cases cited.—*Wilson* v. *Knubley*, 7 East, 128; *Morrant* v. *Gough*, 7 Bar. & Cress. 206; *Farley* v. *Briant*, 5 Nev. & M. 421.

LORD CHANCELLOR'S COURT.—JUNE 1, 1836.

ATTORNEY-GENERAL *v.* WARD.

Re-hearing refused after a Decree of the Lord Chancellor, on Appeal.

In this case an information had been filed by the Attorney-General, under the 59th G. III. c. 91, which was heard before the Master of the Rolls, who made a decree against the defendants; from this decree they appealed to the Lord Chancellor, who affirmed it. The defendants now applied to have a re-hearing. The question was, whether a re-hearing could be granted?

By the 59 G. III. c. 91, s. 2, it is provided, that any appeal which should be made to the Lord Chancellor from any decree of the Master of the Rolls or Vice-Chancellor, in any matter contained in the act, the decree which should be made on such appeal by the Lord Chancellor, should be final and conclusive to all intents and purposes whatsoever, and no appeal from such decree of the Lord Chancellor, to the House of Lords, should be allowed or entertained.

It was contended, for the defendants, that the circumstances of this case, which were peculiar, would warrant his Lordship in granting a re-hearing, and that an act of injustice would be done to the defendants by not granting it.

The LORD CHANCELLOR, in giving judgment, said, he did not feel himself called upon to pronounce any opinion on the 2nd sect. of the act, (which, it was argued, precluded any re-hearing,) because it might be made a precedent in some peculiar cases. His Lordship had been shown no reason for departing from the usual practice of the Court with respect to re-hearings on appeals. The practice of the Court was the same as in the House of Lords in these matters: it would make an alteration which had for its object to make its decrees consistent, and give them effect in cases where there might have been an oversight; but it permitted no application having for its object the reversal of its decrees, because they were final and conclusive. The Court of Chancery followed that practice, and would re-hear an appeal for the purpose of correcting an oversight in the decree, but it would not reverse the decree.

Counsel for the re-hearing.—Mr. Wigram and Mr. Simpkinson.

Counsel for the plaintiff.—The Solicitor-General and Mr. W. Russell.

Vide, as to re-hearing of appeals before the Lord Chancellor, *Fox* v. *Mackreth*, 1 Har. Jur. Arg. 451, and *East India Company* v. *Boddam*,, 13 Ves. 421.

As to re-hearing of appeals in the House of Lords, *vide* 2 Mad. C. P. 579.

JUNE 8, 1836.

CANTRILL *v.* THE GUARDIANS OF THE WINDSOR UNION.

Injunction to restrain Trespass, though the Title was in dispute.—Construction of the Poor Law Act, as to choosing a Workhouse for the Union.

This was a motion on appeal from an order of the Vice-Chancellor, who had granted an injunction against the defendants.

On the 20th of August, 1835, the Poor Law Commissioners issued an order, under the Poor Law Act, 4 & 5 W. IV. c. 76, s. 26, by which several parishes, in Berkshire, including the parish of Old Windsor, were united under the name of the Windsor Union. By the 15th and 16th sections, the commissioners are empowered to make rules for the management of the poor. And, by the 25th section, the commissioners are empowered to order the overseers or guardians of any Parish or Union, having a workhouse, or any building capable of being converted into a workhouse, to enlarge or alter the same.

In pursuance of the act, several meetings took place for the purpose of choosing a workhouse for the union; and Mr. Cantrill, who was one of the parish officers of Old Windsor, and the plaintiff in this cause, together with certain other persons, were appointed the workhouse committee for that purpose.

At one of the meetings, the workhouse committee attended, and

reported that certain land, in Old Windsor, on which some cottages were built, was the best site. In this, the guardians concurred.

On the 2nd of October, a vestry-meeting took place in the parish of Old Windsor, and it was very much objected to the workhouse being in that parish. Mr. Cantrill attended, and said it was the best situation. Another meeting of the guardians took place, and it was agreed that they could not discover a more eligible place for the workhouse. They then forwarded to the Poor Law Commissioners their resolution; upon this, the secretary wrote to the Board of Guardians, and mentioned a memorial which had been sent from the parish of Old Windsor to the Poor Law Commissioners against the resolution of the guardians. Mr. Cantrill, in the mean time, having changed his views on the subject, it was necessary to get an order from the commissioners to take possession of the property. A magistrate, who formed one of the guardians, then went to the cottages, and directed a spade to be put into the ground, as a mode of asserting the right of taking possession; and the guardians also advertised for persons to contract to build the workhouse on the property in dispute. Upon this, a bill was filed by the churchwardens and overseers, for the purpose of preventing the guardians taking possession of the property, except that part marked W, X, Y, and Z; and the grounds for such application were, that the powers of the Poor Law Commissioners were not sufficient to enable them to do so; because it was alleged that the property in dispute was not originally purchased for a poor-house, but that four of the cottages were let to industrious tenants at rents of £10 a year each, and that the churchwardens of Old Windsor received the rents, and paid the same to needy persons; and affidavits were produced from the occupiers of the cottages, to prove that they had never received parochial relief. On the other hand, affidavits were produced from former overseers of the poor, to show that they had received parish relief.

It was further contended, that, under the word "workhouse," in the Poor Law Act, the Commissioners were only warranted in taking possession of the cottages marked W, X, Y, and Z, but had no power to take a foot of land beyond the actual site of the buildings.

The Vice-Chancellor granted an injunction, restraining the guardians from taking possession, pulling down the cottages, or digging up the land, except on the part marked W, X, Y, and Z, in the plan, until the further order of the Court, or until the defendants had established their right at law.

His Honour said that nothing should be done by the guardians, in taking forcible possession, before they established their right at law.

From this order of the Vice-Chancellor, the defendants appealed to the Lord Chancellor; and they contended that the proceedings were most extraordinary, for parties in possession to file a bill to

restrain others from pulling down their houses and committing waste. It was further contended, that the cottages were let at an under-value, that it was not denied that the cottages were built out of the parish money, and that, if the cottages were under-let, the occupiers must be considered as receiving relief; that the difference between the real value of the property and the rent paid, was, in fact, a gift in the shape of a relief. And though they admitted the defendant's right to the cottages W, X, Y, and Z, yet it was absurd to restrain them from taking possession of a foot of land beyond the actual site of the cottages; because they contended, that the word "workhouse" meant merely the building itself, and not any of the land about the house.

It was further contended to be very doubtful, whether the defendants could bring an ejectment. The churchwardens and overseers are considered as a corporation, for that purpose that the property could not be treated as charity land; for the churchwardens and overseers were suing in their corporate capacity, being constituted a corporation under the 39 Geo. III. c. 12, s. 17.

It was further contended, that this was not an injunction to stay waste, but to prevent trespass; for the former injunction could not be maintained, as there was no privity between the plaintiff and defendant to raise a case of waste; there was no authority for the Court of Chancery to interfere by injunction in the case of trespass, when the title was in dispute, that this bill was premature, and that it was not competent for the plaintiffs to come into the Court of Chancery and obtain an injunction, unless they had established their right by trial at law. *Smith* v. *Collyer*, *Chalk* v. *Wyatt*, *Jones* v. *Jones*, *Norway* v. *Rowe*, *Hughes* v. *Trustees of Morden College*.

The Lord Chancellor said, the way in which the question must be tried was by action of trespass and entering, and an acknowledgment of a trespass committed; but, independent of the question, as to the injunction, the order, as it stood, did not give the parties the means of deciding the question; if the order stood, there was the difficulty of knowing how to come to a decision; and if dissolved, then the proceedings were in the same position as they stood in before. It seemed to be a pity, that the parties did not come to some arrangement.

After some observations from the counsel, his Lordship observed, that the only question was, as to how the right could be tried; whether by ejectment, or by trespass. If the action was by trespass, and if nothing had been done amounting to trespass, it would require an admission to that effect. The question to be decided at law was, whether the right was in the guardians, or in the parish officers? His Lordship did not see how the guardians could perform the condition of the order, by bringing an action of ejectment, they having no legal title. His Lordship again ob-

served, that there were two questions to be decided, which could not be done by bringing an action of ejectment, viz., whether the cottages could come under the denomination of a "workhouse?" or, whether the lands could be taken under the act? The right would be ascertained by an action of trespass, brought by the parish officers against the guardians, who would justify under the order of the commissioners, which would bring the question before the Court. His Lordship said, that it would be useless to dissolve the injunction; for if it were dissolved, fresh proceedings would be commenced.

NOTE.—The parties finally agreed that the question should be tried on an action of trespass, in which the parish officers were to admit possession, and the guardians were to admit having committed trespass: this, it was agreed, would settle the question, without again coming before the Court; which would not be the case, had an issue been directed.

Counsel.—Mr. Wigram and Mr. Richards for the plaintiffs, and the Solicitor-General and Mr. Collins for the defendant.

Authorities cited as to the injunction.—*Smith* v. *Collyer*, 8 Ves. 89; *Chalk* v. *Wyatt*, 3 Mer. 688; *Jones* v. *Jones*, 3 Mer. 173; *Norway* v. *Rowe*, 19 Ves. 144; *Hughes* v. *Trustees of Morden College*, 1 Ves. jun. 187.

VICE-CHANCELLOR'S COURT.—JULY 5, 1836.

SANDS *v.* NUGEE.

Power to appoint new Trustees.—Whether the Words "to appoint any other Person," authorises the Appointment of more than one.

This question arose on the title to an estate. The Duke of Roxburghe, by his will, gave a power to appoint new trustees; which power was rather singularly framed. The material words, however, which gave rise to the question, were, "with full power to each of my trustees before named, or to be named by me, who shall accept this trust, to appoint any other person to succeed to him," &c.

James Walker became the sole trustee, the other trustee, named in the will, having disclaimed; and he being such, with a power to appoint another, made his will, by which he appointed three persons to be trustees of the property of the Duke.

The question was, whether Mr. Walker had power to appoint more than one person, the words in the power being, to "appoint any other person."

Mr. Nugee had contracted to purchase the property, the title to which was made through these trustees. Two eminent convey-

ancers, who had examined the title for Mr. Nugee, objected to the title, on the ground that the power was not properly exercised. Mr. Nugee was a willing purchaser, but could not, under the circumstances, complete the purchase.

The VICE-CHANCELLOR thought that the words, "any other person," would authorise the trustee to appoint more than one; and accordingly decreed for the plaintiff.

The counsel for the defendant hoped his Honour would give costs, as two eminent conveyancers had objected to the title.

His Honour, however, would not do so; and observed, that, in cases of this sort, the purchaser ought never to object to pay the costs, because the payment of costs made the decree more conclusive, and strengthened the title.

Counsel.—Mr. Jacob for the plaintiff, and Mr. Campbell for the defendant.

JUNE 25, 1836.

MEADE *v.* ISTEAD.

Exclusive Appointments in favour of Children, as to two separate Sums and two separate Powers of Appointment in a Settlement, where the Trusts were nearly the same.

A husband, under his marriage-settlement, had two several powers of appointment over two several sums of money, in favour of the children of the marriage: the sums were of the same amount, and separately assigned by the same instrument; and though the trusts thereof were declared separately, yet they were the same, except, as to one sum, an additional joint power of appointment was given to the husband and wife. One sum was secured on estates in Ireland, and the other sum was secured by bond. There were five children of the marriage, three of whom, together with the mother, died in the lifetime of the father. The two surviving children (a son and a daughter) attained twenty-one, when the father executed his powers of appointment, which he did at two different times; once on the occasion of the marriage of his daughter, in April, 1833, and afterwards by his will, made in February, 1834. By these two appointments, the sum secured by bond was appointed in favour of the daughter, and the sum secured on the estates in Ireland was appointed to the son.

The question was, whether the father could appoint one sum exclusively to one child, and the other sum exclusively to the other.

It was contended, that as the trusts of the two sums were concurrent, with a slight variation as to the joint appointment, that it ought to be considered as one settlement of two sums; and that, therefore, it could not be an exclusive appointment.

The VICE-CHANCELLOR said it was quite clear the two sums

ought to be kept distinct, and he was of opinion that the execution of the powers were clearly void.

Counsel.—Mr. Jacob, Mr. Wilbraham, Mr. Stinton, and others.

JUNE 25, 1836.

FOSTER *v.* SOUTHEY.

Power of Appointment not properly exercised, where the Witnesses only signed their Names without a Memorandum of Attestation.

By a marriage-settlement, a sum of stock was transferred to trustees, subject to certain limitations therein mentioned, upon such trusts as the wife should, by her last will and testament, or any codicil thereto, to be by her signed in the presence of, and to be attested by, two or more witnesses, appoint; and, in default of appointment, to her next of kin.

She executed a paper writing, which purported to be an execution of the power; the witnesses signed their names only, without stating for what purpose, and without a memorandum of attestation. The question was, whether the appointment was properly exercised. It was stated to be a new case.

The VICE-CHANCELLOR said it appeared to him that there was not enough to show a sufficient attestation to satisfy the power; there were only two names written on the paper, and that was all; it was not a proper execution of the power; and his Honour directed a reference to the Master, to inquire who was the next of kin, following the words of the settlement.

Counsel.—Mr. Jacob, Mr. Spence, &c.

JULY 6, 1836.

ROBINSON *v.* WADDELOW.

Construction of the Words "to be equally divided between my said Daughters and their Husbands and Families," in a Will.

The question in this case was on the construction, in a will, of the words "all the rest and residue of my effects to be equally divided between my said daughters and their husbands and families."

It was contended, for one of the daughters, that the residue was to go between the daughters equally.

For the other daughter, it was contended, that, if his Honour should think the husbands and their children took any interest, that the residue ought to be divided between the two families, without regard to their respective numbers.

For the children of one of the daughters, it was contended, that all the parties took as tenants in common.

For the children of the other daughter, it was contended, that the daughters took a life-interest with the capital to their children.

The VICE-CHANCELLOR said that the words were so vague and uncertain, that he could not give effect to them; and he declared that the two daughters should take the general residue beneficially as next of kin of the testator.

Counsel.—Mr. Knight, for one of the daughters; the Solicitor-General, for the other daughter; Mr. Sutton Sharpe, for the children of one daughter, and Mr. Duckworth, for the children of the other; and Mr. Craig, for the executors.

Cases cited.—*Robinson* v. *Tickell*, 8 Ves. 142; *Cooper* v. *Thornton*, 3 Bro. C. C. 96, 186; *Hammond* v. *Neame*, 1 Swan, 38; *Barnes* v. *Patch*, 8 Ves. 604.

JULY 7, 1836.

RAMSEY *v.* ROGERS.

Accumulative Legacies.

In this case, a bill had been filed by persons beneficially entitled to the residue of a testator's estate; one of the defendants, in her answer, claimed to be entitled, for her separate use, to two annuities of £100.

It appeared, by the Master's report, that the testator gave to his daughter, the wife of ——, a yearly sum of £100, for and during her life, to commence from the testator's death; and he directed the trustees to apply and expend the £100 yearly, and every year, at such time, and in such sums, and for such purposes, (as therein mentioned,) for the use and comfort of his daughter; but if, by the conduct of her husband, she should live separate and apart from him, then he directed his trustees to pay to his daughter, by quarterly payments, an annuity of £100, so long as she should live separate and apart from him; and if the husband should die in the lifetime of the wife, then he willed that his executors should pay to his daughter £100 yearly, by quarterly payments, to commence from the death of the husband, and to be paid during so long as she should continue a widow; and his will and meaning was, that the annuities were to be paid for her sole and separate use.

It appeared that the husband and wife were living together.

It was contended, that this was not an annuity given to a woman living separate from her husband, but an annuity to her when she should live separate from her husband, which was a bequest the Court would not allow. And it was contended, that the general rule, laid down in *Manning* v. *Thesiger*, was, that, where two legacies were given to the same person, of an equal amount, they were held to be substitutional, unless there was an express intention to the contrary; and that, in this case, the testator meant one sum, and that it was the way in which he wished to provide for the three particular events, viz., her living with her husband, her separation from him, and his death.

On the other side, it was contended, that, supposing that she survived her husband, she would be entitled to both legacies, this must be considered two, or rather three, annuities; but as one would cease when the other commenced, there were, in fact, only two annuities. It was further contended, that the first annuity must extend over the whole period of her life, which was different from the other annuities, which were of different duration, and commenced at different times; and that there ought to be a fund set apart to answer the annuities when they should arise; for the events provided for in the will might occur, and the annuities be running together.

The VICE-CHANCELLOR said, in this case, the real question is, whether the same thing was given. It appeared to his Honour that the testator had, in the first instance, given an annuity to his daughter, for her life, and that to commence from the death of the testator; and to be paid at such time, and in such sums and proportions, as the daughter, with the concurrence of the trustees, (for it is that which he means, though very inaccurately expressed), should direct.

It did not appear to his Honour that the second bequest could be held to be an inducement for the husband and wife to live separate and apart, because the words, "if, at any time, from the conduct of her husband, she should live separate," it might so happen that the husband himself might choose to live separate and apart from her; so that this clause cannot be considered altogether void; on that particular event, the testator directs the executors to pay and apply £100 to his daughter by quarterly payments, to commence from the time of the separation; consequently there is a different time for the commencement of the second annuity from the first, and it is to continue so long as she should live separate and apart, and no longer. But, then, suppose it happens that the husband dies, the testator says, if the husband dies, he directs the trustees to pay £100 by quarterly payments, &c.; therefore the third annuity is unlike the second, because it was only to commence after the death of the husband, and it was to be paid by quarterly payments, and being to continue so long as she should be a widow, and the times of payment of the annuities are different; for the first annuity is not to be paid quarterly, which is the case with the others.

It appeared to his Honour, that there were so many circumstances of dissimilarity that he could not allow the fund to be taken out, without providing a sufficient sum during the time she continued to live with her husband, to provide for the annuities; and the dividends of the fund, in the mean time, were to go to the residuary legatee. His Honour said that the case of *Manning* v. *Thesiger* was not a case of the same kind as the present.

His Honour also observed, that he had no doubt the testator

meant to occasion a separation, and that nothing would have pleased him more.

Counsel.—Mr. Wigram and Mr. Jackson, for the residuary legatees; and Mr. Stinton, for the wife; and Mr. Knight, for another party.

Case cited.—*Manning* v. *Thesiger*, 3 M. & K. 29.

ROLLS' COURT.—July 4, 1836.

Ebdel *v.* Nicholson.

Agreement to take a Lease, which bound the Defendant to take such Lease as the Plaintiff could give.

This was a bill for the specific performance of an agreement, and that the defendant might be compelled to execute the counterpart of a lease of a house on Ludgate-hill.

A testator, the father of the plaintiffs, by his will, devised the house on Ludgate-hill to trustees, in trust, to stand possessed of a moiety thereof for his son, J. E. H., for life, and after the decease of J. E. H., in trust for the children of J. E. H., as therein mentioned; in the event of all the children dying under twenty-one, then in trust for the survivors of J. E. H., and the testator's daughter, E. H.; the other moiety was limited in like manner to his daughter E. H.; and the testator empowered the trustees to lease for twenty-one years, at rack-rent.

The testator died, leaving the plaintiffs, J. E. H. and E. H., his son and daughter, both infants, him surviving.

One trustee died, without entering into the execution of the trusts, and the other trustee disclaimed, and died.

The defendant being desirous of taking the house for twenty-one years, and the trustees having refused to take upon themselves the execution of the trusts of the will, and by reason of both the devisees being infants, no valid lease could be made; accordingly, an agreement was entered into, dated the 23rd of June, 1828, and made between the infant children, of the first part; Isaac Ebdel, the grandfather of the infants, of the second part; and the defendant, of the third part. After reciting the devise, the death of the testator, and the disclaimer of the trustees, the minority of the infants, and the desire of the defendant to occupy the premises, J. E. H. and E. H., in consideration of the improvements made by the defendant, covenanted and agreed that they would respectively, on their attaining twenty-one years, grant to the defendant a good and effectual demise, by indenture, of the premises therein described, to hold, to the defendant, for twenty-one years, at a certain rent, till the lease was granted, and at an increased rent, on the lease being granted; and the lease was to contain covenants

for payment of rent, for quiet enjoyment, &c. Isaac Ebdel, the grandfather, covenanted with the defendant, in consideration of the repairs and improvements, that he would indemnify the defendant in respect of the repairs, in case the lease should not be granted. And it was agreed that the defendant should enter immediately, and continue in possession till the lease should be granted, and should keep the house in tenantable repair.

A bond was executed by the grandfather on the 23rd of June, 1828, in the penal sum of £1000, with a condition to make void the same, if the plaintiff, or other persons lawfully entitled so to do, should, on the 24th of June, 1831, (which was the time the children came of age,) grant to the defendant a good and valid lease, and indemnify him from all losses in respect of repairs, or by reason of being disturbed.

On the 24th of June, 1828, the defendant took possession, J. E. H. attained twenty-one in 1830, and E. H. in June, 1831; and, on their attaining twenty-one, a draft lease was prepared, which the defendant was requested to execute, but he refused to do so.

In May, 1833, the bill was filed.

For the plaintiff, it was contended, that one trustee having died, and the other renounced, that J. E. H., as heir of the testator, would be entitled; but that, at all events, the defendant, having entered into the agreement with a knowledge of the plaintiffs' title, (it being recited in the agreement,) that the defendant was bound to take such title as the plaintiffs could give him; and that the defendant's object, in refusing to execute the lease, was because he wished to continue possession at the reduced rent.

For the defendant, it was contended, that a valid lease could not be made, as one trustee never acted, and the other had died, having disclaimed by parol only, which was not a good disclaimer.

It was stated, that the defendant wished to have the lease, provided he could have a valid lease granted to him; that the legal estate was vested in the heir of the surviving trustee; and that as there was no trustee to execute the power of leasing, it was submitted that his Lordship could empower the tenants for life to do so, or they must procure the heir-at-law of the surviving trustee to join; and, in fact, they must grant, or procure to be granted, a valid lease to the defendant.

The Master of the Rolls said that the defendant must perform the agreement, and that, by the contract which he had entered into, he had bound himself to accept such a lease as the plaintiffs could give him.

Counsel.—Mr. Pemberton for the plaintiffs, Mr. — Turner for the defendant.

VICE-CHANCELLOR'S COURT.—July 9, 1836.

Sutton *v.* Deere.

Vendor and Purchaser.—Recital of an Original Grant held sufficient.—Title to Timber.—Purchaser having paid Interest on Purchase-money, entitled to the Benefit of the Rise in the Funds. —As to the Costs.

In this case, the bill had been originally filed by a purchaser, for a specific performance of a contract.

A reference had been made to the Master, to approve of the title.

The first question was, whether a reference to the Master, to inquire whether a good title could be made to the lands, authorised him to inquire as to the title to the timber?

The Vice-Chancellor said that the timber on the lands were part of the lands, and consequently he was authorised so to do.

The property was held for a term of 999 years, granted by an indenture, made in the third year of the reign of Edward the Sixth; the original grant was not produced, but a recital of that deed was held sufficient.

By one of the conditions of sale, interest was to be paid on the purchase-money from a certain day; part of the purchase-money had been paid into Court, and invested in the funds; it was admitted that the purchaser was entitled to the benefit of the rise in the funds since the purchase-money was paid in, he having paid interest.

It was also held to be the general rule, that the vendor should pay costs up to the time the title was made out; and after that period, the purchaser was to pay the costs.

Counsel.—Mr. Knight, Mr. Cooke, Mr. Cole.

July 12, 1836.

Slade *v.* Goodman.

Application ex parte, under 1 *W. IV. c.* 36, *s.* 15, *to appoint a Person to convey the Property of a Prisoner in Contempt, good.*

Mr. Chandless stated to the Court, that a motion had been made *ex parte*, under 1 W. IV. c. 36, s. 15, to appoint a person to execute a conveyance of the property of a prisoner in contempt, and that one of the registrars had refused to draw up the order on an *ex parte* application; and he stated, as a reason, that, in a case of *Wollaston* v. *Baker*, notice was held to be necessary.

All the other Registrars were of a different opinion.

The Vice-Chancellor said he was of opinion the application was properly made *ex parte*, especially as, by the latter part of the section, it is provided that notice is to be given afterwards, and that he knew of no such case as that referred to by the registrar.

ROLLS' COURT.—June 25, 1836

Everett *v.* Ward.

Persons beneficially entitled to Money, to arise by Sale of Real Estates, under Circumstances, not necessary Parties to a Suit to administer Testator's Estate.

Mr. Tinney took an objection, in the opening of this case, that the persons beneficially interested in the residue were not made parties to this suit, which was to administer the estate of a testator. He devised his estates to trustees, in trust, to pay the rents to his wife for life; and after her death, the trustees were to sell the real estates, and stand possessed of the money to arise by the sale thereof, in trust, to pay his debts, and perform other trusts therein mentioned; and then it should sink into, and form part of, his personal estate: and there was a declaration, that the monies to arise by sale should be considered as personal estate; there was also a declaration, that the trustees' receipts should be sufficient discharges. The residue was to go to his children and their issue. The testator left children, some of whom died, leaving children, who were infants; and one of the testator's children was an infant.

Mr. Kindersley contended that they need not be made parties, because the trustees were fully empowered to give receipts, and no person was bound to see to the application of the money.

On the other hand, it was contended, that the power was given to the trustees for the purpose only of giving discharges to a purchaser; but that, on a distribution of the fund, the parties interested ought to see that it was properly distributed, and, consequently, ought to be made parties.

The Master of the Rolls said there could be no objection for want of parties, and that the suit must proceed.

July 6, 1836.

Lowden *v.* Attorney-General.

Devise to a Charity out of a mixed Fund.—Release by the Heir-at-Law—Whether the Words "founding, establishing, and endowing," necessarily imply purchasing Land?

A testator devised and bequeathed certain real and personal estates to trustees, and directed the real estates to be sold, and the produce thereof, together with his personal estate, to form a mixed fund, out of which they were to pay legacies; and he gave a legacy of £400 out of the fund, to be employed in "founding, establishing, and endowing, a small charity school;" and the residue was to go amongst his nephews and nieces, and their children, in manner therein mentioned.

The testator left several nephews and nieces, one of whom, T. R., was his heir-at-law. The estates were sold, and, afterwards, a deed was executed, by which (after reciting the will of the testa-

tor, and that the several parties were willing and desirous that the charitable intentions of the testator should be carried into effect,) the parties thereto of the first part, (being the heir-at-law, and nephews and nieces,) severally covenanted to pay the sum of £400 to such persons as were named and appointed by the will to receive the same, and that without being answerable or accountable for the said sum of £400; and, by the said indenture, they released and discharged all their rights, both at law and in equity, to the sum of £400.

The question (which came before the Court on further directions,) was, whether the portion of the £400, which was to be paid out of such part of the mixed fund as consisted of the produce of the real estates, and which was void, was confirmed by the subsequent deed? And the other question was, whether the words, "founding, establishing, and endowing, a charity-school," necessarily implied the purchasing land, and building a school-house?

For the heir-at-law of T. R., the heir-at-law of the testator, it was contended, that T. R. executed the deed in the character of residuary legatee, without knowing his rights; that the deed did not recite that it was a mixed fund; it did not state who was heir-at-law; it merely stated the gift of the charity legacy.

The Master of the Rolls.—If these circumstances are not stated on the face of the deed, the Court may look any where also to find them.

For the residuary legatees it was contended, that the personal representatives of the heir-at-law ought to have been made parties.

The Master of the Rolls said he did not see the necessity of their being made parties, if the deed was properly executed.

It was further contended, that the words "founding, establishing, and endowing, a small charity-school," meant to build a school-house.

The Master of the Rolls said, the question was, whether those words necessarily implied the purchase of lands; they might found a charity, by investing the money in stock, and apply the produce in paying a school-master for educating the boys at his own school; and his Lordship asked, what was more common than to endow a fellowship, by investing stock. They might hire a school-house.

It was further contended, that it was impossible that the testator meant that each school-master should have a new school-house; that the deed would be of no avail, because it was for the purpose of confirming that which was absolutely void. It was quite clear, that if the deed was an original gift of the fund, it would be void, because it was not enrolled; how then could it operate as a confirmation of a void devise? The only way it might operate, would be by way of release to the executors.

For the Attorney-General, it was contended, that, even if the gift to the charity was void, still, as the heir-at-law had joined in

the deed, he was bound by it; and that, by the words of the will, it was not necessary to lay out the money in lands; and the reason why the heir-at-law, and the other legatees, joined, was, that the executors were advised not to part with the fund till they joined, and that the mixed fund ought to be apportioned.

The MASTER OF THE ROLLS said, in fact, the £400 was raised before the deed was executed; and there was no real estate at all at the time of the execution of the deed, a portion of which belonged absolutely to the heir-at-law: he had given up that money, which he might do; and his Lordship said that, under all the circumstances of the case, that fund was applicable to the charity.

Counsel.—Mr. Tinney, for the heir-at-law of the testator; Mr. Wray, for the Attorney-General; Mr. Pemberton, for the rector of the parish; Mr. Spence and Mr. Heathfield, for the representatives of the residuary legatees; Mr. Turner, for one of the trustees; Mr. Kindersley and Mr. Hethrington, for other parties.

Cases cited.—*Foy* v. *Foy*, 1 Cox, 165; *Attorney-General* v. *Parsons*, 8 Ves. 190; *Attorney-General* v. *Williams*, 4 Brown, C. C. 526; *Johnston* v. *Swann*, 3 Mad. 457; *Giblett* v. *Hobson*, 5 Sim. 651; *Rae* v. *Jackson*, 5 Russ. 35.

VICE-CHANCELLOR'S COURT.—JULY 12, 1836.

BRADLEY *v.* HUGHES.

Trusts, for the separate Use of a married Woman, restricted to the first Marriage only.

This was a suit by a husband and wife and the trustees of the settlement of the wife, against the provisional assignee of the husband.

And the bill prayed that it might be declared that the wife might be entitled to an annuity for her sole and separate use.

In 1815, Mrs. Bradley, who was then a Miss Solomon, married M. L.; and, on that occasion, a settlement was made, in which her father conveyed certain lands to the use of himself till the marriage, and, after the marriage, to trustees, for a term of years upon the trusts therein after mentioned; and the trusts of the term were, that the trustees should yearly, and every year during Mrs. Bradley's life, by and out of the rents and profits, or, by bringing actions, levy and raise the annual sum of £200, if such rents amounted to £200, and pay and apply the same, by half-yearly payments, on certain days therein mentioned, and to be paid to such person or persons, intents, and purposes, as Mrs. Bradley should, by any writing or writings, from time to time, direct and appoint; and, in default of such direction or appointment, that the said trustees should pay the said annual sum into the hands of

Mrs. Bradley, for her sole and separate use, without being subject to the debts, control, or engagements, of the said M. L., her husband; and the receipts of the said Mrs. Bradley should, notwithstanding her coverture, be good and effectual releases and discharges for the sums therein expressed to be received; and, after the decease of Mrs. Bradley, for her children, in manner therein mentioned. Then there was contained a covenant, on the part of S. Solomon's, to make good the £200 a-year, in case the rents should be deficient.

Her first husband died, and she married her present husband, who afterwards took the benefit of the Insolvent Debtors' Act. The question was, whether the annuity became vested in the assignee of the husband, subject to the wife's equity to a settlement, or in the wife, to her separate use.

For the plaintiff, it was contended, that she took the annuity for her separate use during her life; and if it was not for her life, she was not to have it all.

The Vice-Chancellor.—It appears to me that the trust for her continues; but the question is, whether the trust for her separate use continues.

Counsel.—The question is, whether the words, "for her separate use," are limited to the first coverture. If it is held to be limited to the first coverture, the consequence would be that the wife would get nothing after the death of M. L., her first husband.

The Vice-Chancellor.—I do not see how you can get rid of the various decisions on this subject. I recollect, when I decided the case of *Benson* v. *Benson*, I was very much pressed with the case of *Massey* v. *Parker*, then lately decided. I recollect, in the case of *Benson* v. *Benson*, it was not necessary to decide the point. I had occasion to consider all the cases in a late case. I do not mean *Davis* v. *Thornycroft*, but ——— v. *O'Callaghan*. I then read all the cases, and referred to them all. The question would be, whether there was anything more than a provision for restraining alienation during that very marriage. The case of *Ellis* v. *Cordrey* (which was cited by counsel,) does not apply to this case.

Counsel.—If the clause, by which it is to be paid to her separate use, is gone by the death of M. L., then she will get nothing; because it is only under that clause that she takes the annuity; the trust of the settlement, declaring the gift to her, does not contain any declaration of trust in case the husband should die in her lifetime; consequently the father would take by resulting trust.

The Vice-Chancellor.—I remember the time, when the case of *Benson* v. *Benson* was brought before me, I was much pressed with the meaning of the judgment in *Massey* v. *Parker;* it appeared to me, at that time, that I could not decide the case before me without contravening what was said to be the meaning of the present Lord Chancellor. I decided the case upon the con-

struction of the words, in order to determine how far the separate interest was given by will. And what fell from me, in *Knight* v. *Knight*, was in consequence of what was said by the counsel for the defendant. It appears to me now settled, by a series of decisions—*Woodmaston* v. *Walker*, *Brown* v. *Pocock*, and some other cases—that an estate may be given to the separate use of a woman during a particular coverture; but that, if an estate is meant to be given for the separate use (by separate use, I mean so as to prevent her from alienating,) of a separate woman before she is married, with terms to prevent her from alienating, if she be *sui juris*, she may dispose of the estate; and it would operate as a restriction when under coverture. The real question in this case is, whether, between the death of the first husband and her second marriage, she was entitled to her own use. It appears to me that there is nothing in the form of the deed to prevent her from making an alienation of the annuity during her life, after the death of the first husband; and if she could alien, then the assignee of the husband would be entitled; if she could not, they never would. It is a trust for her separate use during the coverture which existed at the time the settlement was made, and, according to the course of decisions, it is merely a trust for her after that period, which she may alienate. But here it appears the marital right intervenes. I can conceive a case in which the words may be so framed as, of necessity, to prevent the second husband from having any right, if the estate is made to go over to a person named, in the event of the money not being paid into the hands of a married woman; if the condition arises, the estate goes over; she must either take it, or it must go over; the consequence would be, not that the second husband would have it, but, if the wife did not have it, the third person would. It appears to me, that if, by virtue of the words, during the coverture, it was to be for her separate use, and, after the husband's death, she is to have it, that consequently the assignees shall have it, subject to a provision to be made on her by settlement. It is the same, as if the husband had made an assignment of it, why, in that case, she would be entitled to have her settlement; and if no settlement was made, and she survived, the thing would not be good of course. As I understand it, the assignees are entitled, subject to her equitable right. *Primâ facie*, she is entitled to the settlement.

Counsel.—Mr. Jacob and Mr. Parker, for the plaintiffs; Mr. G. Reynolds, for the defendants; and Mr. Barker, for the trustees.

Cases cited.—*Benson* v. *Benson*, 6 Sim. 126; *Davies* v. *Thornycroft*, *ante*, p. 13; *Knight* v. *Knight*, 6 Sim. 121; *Woodmaston* v. *Walker*, 2 R. & M. 192; *Brown* v. *Pocock*, 5 Sim. 663.

JULY 15, 1836.

GARDNER *v.* LACHLAN.

The Owners of a Ship cannot recover against the Freighters on the Charterparty, unless named in it.

Notice of an Assignment of Freight must be given to the Broker, and not to the Freighters.

A specific Security for a certain Sum will not do away with a general Lien for a larger Sum, though the smaller Sum is recited to be due.

In this case, a person, named Scott, was the owner of a ship, called the Prince Royal, which was chartered by the Lords of the Admiralty to make a voyage to New South Wales; the defendant, Lachlan, (who was a broker,) executed the charterparty, but Scott, the owner, was not named in it.

In March, 1832, the ship sailed on her voyage to New South Wales.

The plaintiff having advanced £800 to Scott, for the purposes of the ship, Scott, by an indenture made in August, 1832, which did not recite the charterparty, but recited that Scott was the owner of the ship, called the Prince Royal, and that he was indebted to Gardner in the sum of £800, assigned to Gardner all the hire, freight, &c., which might become payable by virtue of the charterparty, or on account of the voyage, for the purpose of securing to Gardner £800, and future advances, not exceeding £1000.

On the 27th of August, Gardner gave notice of the security to Lachlan, but no notice was given to the Admiralty. In January, 1833, Scott became a bankrupt, and, in the same month, the ship returned. This bill was filed by Gardner against Lachlan and the assignees of Scott, praying that Lachlan might be ordered to pay the money into Court.

For the plaintiff, it was contended, that Scott could not bring his action at law for the recovery of this money, he not having been named in the charterparty; in support of which, they cited the case of *Schack* v. *Antony*, and that it was not necessary to give notice to the Admiralty, but that proper notice was given to Lachlan, who must be considered in the light of a trustee.

For the defendant, it was contended, that the contract was, in fact, between the government and Scott, and that Lachlan only acted as the broker: he was not even a trustee, much less an owner, and that Scott could recover against the government; that, in the case of *Schack* v. *Antony*, Lord Ellenborough allowed a verdict to be taken, subject to be set aside by a court of law; and the grounds were, that as the charterparty was under seal, the action would not lie.

The Vice-Chancellor.—That case of *Schack* v. *Antony* decided that the *cestuique trust* could not have the benefit of the covenant; for Lord Ellenborough says, "If a bond were given to a trustee,

it could hardly be contended that an action of *assumpsit* might be maintained by the *cestuique trust*, for the recovery of the money secured by the bond," &c. Can any body sue on the charterparty, except those who are parties to the charterparty? I don't say the case is decided. It has been decided, in *Schack* v. *Antony*, that the person, who may be said to have the benefit by means of the covenant, cannot bring an action of *assumpsit*. Can he bring covenant? can any instance be produced, that a person can bring an action on specialty, without being a party to the deed? Take it in another form; is there any instance in which the owner of a ship has ever brought an action on the charterparty, he not being a party? I don't say the case has been decided.

Counsel.—We want to bring an action; we don't want to come here, but only to be permitted to bring an action at law.

Vice-Chancellor.—In order to bring an action on the charterparty, there must be some principle of law produced that will enable a person, not a party, to maintain an action.

Counsel.—The case of *Schack* v. *Antony* was decided on *assumpsit;* this case never was decided. Supposing it is decided against us, then the broker is a trustee for us. His duty will be to receive the money, and pay it over to us. The assignment to Gardner is not good; for you cannot assign a chose in action, without notice to the person who owes the money. Policies of insurance cannot be assigned without notice to the insurance office. Your Honour has decided that, in the case of *Williams* v. *Thorp*.

Vice-Chancellor.—The Master of the Rolls decided a case on a bond, and I on a policy. If the action of *assumpsit* is brought on some other ground than the specialty, it might be supported.

Counsel.—The owner of the ship is the registered owner; the broker enters into the charterparty, on behalf of the owner; and the words, "on behalf of the owners, their executors, administrators, and assigns," is sufficient, without mentioning their names; the owners are also referred to in other parts of the instrument.

They ought to have searched the register, and, knowing that it was chartered by the Admiralty, they ought to have gone to the Admiralty. Supposing the ship was not properly provided with stores, &c., an action might be maintained against the owners by the Admiralty.

Vice-Chancellor.—What action?

Counsel.—An action for non-performance.

Vice-Chancellor.—Supposing the Lords of the Admiralty were to declare in covenant, could that be done?

Counsel.—If a person enters into a covenant through an agent, damages may be recovered against the principal.

The VICE-CHANCELLOR, in giving judgment, said: It appears to me, that the person authorised to bring the action would be Lachlan. I am quite free to admit, that if there is a separate promise of any sort made by the Lords of the Admiralty to Scott, then

Scott might recover on that promise, it being separate. And it appears to me, that Scott could not, by means of the charterparty, recover by *assumpsit*. It is quite clear that Scott could not recover on the charterparty. It is always a settled rule of law, that a person, not named in a deed, cannot recover on that deed; but a deed may be so constructed as to give a right of action, as in the case of a deed-poll; because the very nature of a deed-poll excludes the idea of more than one party. The name of any one case has not been stated to me, to throw so much as a doubt on the general rule of law, so as to induce me to permit the plaintiff to bring his action at law. The principle appears to be so plain, and unaffected by cases on principle, that I do not think it right to allow the case to go for the opinion of a court of law. The next question is, whether sufficient notice has been given, so as it may be fairly said that Scott had no longer the order and disposition of the thing? It was said, that Scott had a right to receive from the Lords of the Admiralty the sum due on the charterparty; now, as I understand the charterparty, and the substance of the evidence, that the dealing by the Lords of the Admiralty was to be with one person, it appears to me that the object of the Lords of the Admiralty, at the time, was to deal with one person, and not to be subject to the inconvenience of having transactions with the persons who, from time to time, might be owners of the ship. It is a great convenience to them, to deal with one person instead of with numerous persons. It is perfectly true, before the Lords of the Admiralty enter into a charterparty with a broker, they ascertain that he is authorised to pledge the ship; they require to see some authority from the owners, because it must be shown that he is the person selected to deal with them; when that is done, then it is enough. It was not agreed that Scott could release the Lords of the Admiralty for what was due on the charterparty; it is not implied in the language of the charterparty. The broker, at the time when the money is paid to him, may deduct what is due to him for agency. It is a common custom, in employing a ship broker, to have an account with him: he has a right to set off the amount of what is due to him. We know that it is the constant practice to keep running accounts with the brokers, and from time to time to settle those accounts; and I should think, *primâ facie*, any notice given by Scott to the Lords of the Admiralty would be disregarded, until an authority from the broker is given to deal with the ship owner as principal. The charterparty is made between the broker and the Admiralty, and the Lords of the Admiralty provide so as always to have one person to deal with. The only right of Scott was the right to receive from the broker, when the freightment was paid, so much as he could fairly claim. If nothing was due to the broker, he would, of course, be entitled to the whole of the sum. All must, then, admit the right of Scott to receive the whole, in that case. Scott does, in fact, by assignment, in August, 1832, as-

sign to the plaintiff all monies due on the charterparty, as owner, (because the assignment takes notice of the fact, that he is owner,) and all the money due. Then notice of the assignment is given to Lachlan. It does not appear to me necessary, that notice should be given to the Lords of the Admiralty, because, if notice is given to Lachlan, he is placed in this situation; that it is at his peril that he parts with the money to any other person than the person giving notice. The case does not appear to me to be similar to the case of a policy of assurance; for, in that case, the assurers make themselves liable to pay the assured certain sums; and, in that case, in order to make the assignment good, it is held necessary to give notice; but, in this case, if there is money due on the charterparty, there is of necessity a third party interested, because there is the government. It must be taken for granted, what the government paid to Lachlan would be paid to those to whom Scott assigned, because it is an assignment by him of what was due to Lachlan. It appears, from these circumstances, not necessary to give notice to any other person than Lachlan; if it was given to the government, it would be disregarded; it was never meant by the Admiralty to recognise any other person than Lachlan. Scott could only have claimed from him; and the notice to him was sufficient. It appears to me, on both points, to be in favour of the plaintiff; and, to the extent for which the assignment is made security, it is recoverable.

Another question arose in this case. It appears, that at the time the assignment was made to Gardner, that he effected policies of insurance on the ship for Scott, which policies he retained in his own hands. It also appeared, that there was due to Gardner £1,400.

It was contended, that the plaintiff had a security to the extent of £1000 on the assignment, and that he had a lien on the policies for the remainder.

For the defendant, it was contended, that if you have only a general lien, and you neglect to take a security for more than a portion of what was due to you, you must take it for better and worse: the plaintiff, by the assignment, admitted that £800 only was due to him.

The Vice-Chancellor.—The question is, supposing a person has a general security for any debt, and then takes a specific security, whether that will destroy the general security? Supposing, instead of giving the specific security, he had paid the £1000; the question is, whether this deed is not a representation that the debt did not exceed £800; it does not follow, because the debt amounted to £800, that it did not exceed it. Does the recital, that £800 is due, (supposing it should turn out that, at the time the deed was executed, there was a debt of more than £800,) whether Gardner would not be entitled to avail himself of his general security? It appears to me that it does not do away with any other security.

Counsel.—Mr. Jacob and Mr. Stevens, for the plaintiff; and Sir W. Horne and Mr. Cole, for the assignees of the bankrupt; Mr. Simon, for Lachlan.

Cases cited.—*Williams* v. *Thorp*, 2 Sim. 257; *Douglas* v. *Russell*, 4 Sim. 524; *Schack* v. *Anthony*, 1 M. & S. 573.

JULY 23, 1836.

PRICE *v.* BASSETT.

One Tenant in Common cannot go into Equity for a Partition, where the other has been in undisturbed Possession of the Property more than Twenty Years.

This was a suit for a partition of an estate, which consisted of two houses, in Newport, in the Isle of Wight, in respect of which the plaintiff claimed to be entitled to one-third as heiress-at-law of Sarah Golding, suing in *forma pauperis*. The defendants, Sir Richard Bassett and C. Bassett, had purchased the property.

The fee simple of the property formerly belonged to Henry Golding, who died in 1791, intestate, and left three daughters, Jane, Mary, and Sarah. Jane and Mary were daughters by his first wife, and Sarah by his second wife (E. Golding). Sarah was, at the time of her father's death, an infant, and she died, in 1795, intestate and unmarried, being still an infant. The intestate's wife, E. Golding, (who married him,) was entitled to dower, and she lived till 1816. W. H. Golding, who was heir-at-law to Sarah Golding, was born in 1776, and, at the death of Sarah, was about nineteen years old. He had been an apprentice, and had ran away and enlisted as a soldier. He died in Spain, in 1809, soon after the battle of Talavera, in consequence of a wound which he had received there. On his death, his brother Thomas, who was his heir-at-law, died in 1814, without entering into possession; and he left the present plaintiff his heiress-at-law, who was then five years old. She came of age in 1830, and married. In the meantime, from the death of Henry Golding, the widow and the three daughters were in possession; and, after Sarah's death, the widow, and the two surviving daughters, continued in possession. One of the daughters, Mary, married a person named Evans; and Jane died, and devised her interest to a Mr. Pinhorn, afterwards Sir John Pinhorn. By a deed, dated the 1st and 2d of August, 1799, and made between Evans and wife, of the first part, Sir J. Pinhorn, of the second part, E. Golding, of the third part, and Harvey, of the fourth part, which recited that H. Golding was seised in fee, and died intestate, leaving Mary and Jane, his daughters, by Rebecca, his first wife; and Sarah, by his second wife, Elizabeth; and, on his death, the messuages descended to his three daughters, subject to the dower of the widow; and that Sarah died without having been seised of her share, and that it descended to her heir. It recited that Evans and wife, Pinhorn, and E. Golding, had contracted with Harvey for the sale of the premises for £600. It was wit-

nessed that they conveyed the entirety of the property to Harvey, and Evans and wife covenanted to levy a fine.

By a bond, bearing even date with the deed, which recited that some difficulty had arisen whether Sarah Golding was not seised of her share of the hereditaments, by reason of a question as to *possessio fratris*, and as to whether the same did not, on her death, descend on her cousin, W. Golding, a son of a deceased uncle, W. H. Golding, the condition was, to procure a conveyance, to be executed by W. Golding, or other persons entitled thereto, to Harvey, and for saving him harmless in the meantime.

By divers mesne conveyances, the property became vested in the present defendants.

The real question was, whether the plaintiff was entitled to the share of Sarah?

The present bill was filed in 1831, two years before the passing of the 3 & 4 W. IV. c. 27, which enacts, sec. 12, that the possession of one tenant in common shall not be the possession of the other.

For the plaintiff, it was contended, that there had been nothing to show that an actual ouster took place between 1809 and 1814, (the only time an ouster could have taken place,) and that the statute had never began to run. In *Doe* v. *Prosser*, it was held an ouster might be presumed by the receipt of rents for the period of thirty-six years. In this case the rents were received, in 1799, by persons denying the title, having recited that it was bad.

The plaintiff did not come of age till 1828, and ouster could not be presumed during the time she was an infant. And, up to 1809, W. H. Golding was serving abroad. He died in 1809. From that time there is an adult heir, who died in 1814. Only nineteen years elapsed from the death of Sarah, the daughter. Since 1814, the fact of the non-receipt of the rents is to be accounted for by the infancy of the plaintiff.

Vice-Chancellor.—Here has been a possession, on the part of the defendants, for more than twenty years before the filing of the bill; and it appears to be an adverse possession, in which the defendants have been undisturbed for twenty years, before the filing of the bill. It has always been a rule, that this court will not interfere, where a party has been in possession twenty years.

Counsel.—There has never been an adverse possession, because the possession of one tenant in common is the possession of the other.

Mr. Puller was about to read the evidence, when

The Vice-Chancellor said: It appears to me, that, if the title is in dispute, the parties must, at least, establish their title at law, before they can come here. I take it for granted, that the facts, stated by Mr. Jacob, would come out in evidence, viz., as to the facts that Sarah died in 1795, and that, on her death, W. H. Golding was her heir, and that there was an exclusive possession from

1799. In *Doe* v. *Prosser*, mere possession alone was held sufficient; for it does not appear what became of the parties after the death of the tenant for life. The case, as it stands, is a case in which the parties in possession were held to be entitled, because they were in possession thirty-six years merely. There is nothing to show what became of those who were to take after Taylor.

Counsel.—The only evidence of ouster here is, the receipt of the rents.

The VICE-CHANCELLOR.—It appears to me, upon the evidence of the case, that a jury would be directed to presume an actual ouster. Sarah died in 1795; W. H. Golding was of age in 1799; and, in point of fact, he is not proved to be out of the country; and at that time, in 1799, a conveyance is made to a person for £600, which was considered as the purchase for the whole estate. It is true, there was a bond, which is for the purpose of indemnifying Harvey from the claims of any persons who might be entitled; and also a covenant to levy a fine of a moiety, which was levied with proclamations. It appears to me that the very transaction, that the parties who undertook to convey, shows that they undertook to hold adversely as against the party entitled. They gave a bond only to convey the legal estate in one-third: the very act shows that they meant an adverse possession; and the circumstance of levying the fine, shows that they knew their respective rights, for there is no fine levied by Sir J. Pinhorm, because he was competent to convey. It does not appear to me that the parties can recover at law. The bill must be dismissed. The utmost permission I can give is, for the parties to proceed at law before they can come here.

Counsel.—Mr. Jacob and Mr. Puller, for the plaintiff; and Mr. Knight and Mr. Wray, for the defendant.

Cases cited.—*Roe d. Truscott* v. *Elliot*, 1 Bar. & Ald. 85; *Fairclaim d. Empson* v. *Shackleton*, 5 Burr. 2604; *Doe d. Thorn* v. *Phillips*, 3 Bar. & Ad. 753; *Doe* v. *Prosser*, 1 Cowp. 217.

PODMORE *v.* GUNNING.
STAINES *v.* GUNNING.

Motion for an Injunction dismissed by the Master of the Rolls, the Question having been under the Consideration of the Vice-Chancellor.

A few days after the judgment was delivered in the cause of *Podmore* v. *Gunning*, reported *ante* p. 74, a motion was made before the Vice-Chancellor to order the money then in court, in the cause of *Podmore* v. *Gunning*, to be transferred to the cause of *Staines* v. *Gunning*, a cause in which the plaintiffs were defendants in the other cause, and which was set down for hearing be-

fore the Master of the Rolls; his Honour refused this motion. On the 13th of July, an application was made to the Vice-Chancellor, in the cause of *Podmore* v. *Gunning*, to grant an injunction to restrain the defendant, Mr. Gunning, from selling out any part of the stock standing to the credit of the cause of *Podmore* v. *Gunning*, until the question should have been decided by appeal to the Lord Chancellor. In support of the motion, an affidavit was produced, stating that the defendant, Mr. Gunning, was in insolvent circumstances; that he had no money besides his half-pay; that he had been in the habit of residing continually abroad; that he had no settled place of residence; and that it was greatly feared he was upon the point of quitting the country. In answer to this, an affidavit was filed by Mr. Gunning, stating that he was not in insolvent circumstances; that he had an estate of nearly £300 per annum, besides his half-pay and pension; that his debts, of every description, did not amount to £300; that he had not been out of England for more than ten days for the last twenty years, except while on duty with his regiment, at the battle of Waterloo; that he had kept a house at Cheltenham till very lately; and that now, owing to his law business keeping him so much in London, his residence was at an old established hotel, where he and all his family had been known for upwards of twelve years; and at the Junior United Service Club; and that he had no intention whatever of quitting England. Thereupon, his Honour dismissed the application with costs.

Shortly afterwards, a motion was made before the Master of the Rolls, in the cause of *Staines* v. *Gunning*, for an injunction to prevent Mr. Gunning from disposing of the funds in dispute, until the cause of *Staines* v. *Gunning* should have been decided. In support of the motion, the very same affidavit was produced which had been produced before the Vice-Chancellor. Mr. Girdlestone contended that it was not competent for his Lordship to grant what his Honour had refused. His Lordship said that he should communicate with the Vice-Chancellor on the subject.

JULY 27.

The Master of the Rolls said that he had found, on communicating with the Vice-Chancellor, that his Honour considered the question in *Staines* v. *Gunning*, had been under his consideration; his Lordship therefore refused the motion, with costs.

Counsel for the plaintiff.—Mr. Pemberton and Mr. Teed.

Counsel for the defendant.—Mr. Kindersley and Mr. Girdlestone.

VICE-CHANCELLOR'S COURT.—July 23, 1836.

Skeeles *v.* Sherley.

Notice to an Appointee, of a Judgment against an Appointor, whose Estate is limited to Uses to bar Dower, does not prevent the Appointee from taking the Estate free from the Judgment.

In this case, a person had an estate limited to the common uses to bar dower, and, before he executed the power, judgments were entered up against him. Afterwards, a person, having notice of those judgments, advanced £1000, and the power was executed in his favour by way of mortgage.

The question was, whether the estate, in the hands of the appointee, was subject to the judgments?

The Vice-Chancellor said he had notice of the judgments, which would effect the estate of the conusor. If he exercised his power of appointment, he would not convey the estate, but merely appoint an interest which was not derived from the appointor, but from the donor of the power. The judgment, given by the conusor, bound the estate vested in him, but he did not convey, but only exercised the authority. The judgment was not so constructed as to effect this appointment. He has only notice that the judgment will bind the estate, if the appointor does not pass it by appointment. All that is meant, by having notice, is, that it will bind you so as that you cannot set up an estate at law against an equitable right, that is all. A married woman has an incipient right to dower, and if there is a limitation out of the estate to such uses as the husband shall appoint, if he does not execute the power, the wife is dowerable; if he executes the appointment, the dower is divested.

His Honour said he wished the cause should stand over, in order that it might be regularly argued.

Mr. Simons, in the course of the argument, stated, that his Honour had decided the case in *Eaton* v. *Sanxter*, which was printed, but not published; and, in the course of the day, he produced the case, which was handed up to his Honour, who, having read it, said that it appeared to him to be directly in point, but he did not recollect at the time that he had decided it.

July 30.

The case was again mentioned to his Honour by Mr. Stuart, who stated that the case of *Eaton* v. *Sanxter* had since been published, which decided that the judgment was defeated, notwithstanding the notice, and that the parties wished the case to be again argued; that the case of *Eaton* v. *Sanxter* had not given satisfaction to the conveyancers; and that it was intended to bring the question before the Lord Chancellor.

His Honour observed, that he thought that all parties had

acquiesced in his decision made on the 23rd; but he would, however, if it was wished, direct it to be sent to a court of law.

Mr. Knight observed, that the question had been twice before a court of law; once in the case of *Doe* v. *Jones*.

Owing, however, to the absence of Mr. Wigram, it was not settled how the case should be disposed of.

Counsel.—Mr. Knight and Mr. Lovatt, for the plaintiff; and Mr. Wigram and Mr. Stuart, for the defendant.

Cases cited.—*Doe* v. *Jones*, 10 Barn. & Cress. 459; *Tunstall* v. *Trappes*, 3 Sim. 300; *Eaton* v. *Sanxter*, 6 Sim. 517.

ROLLS' COURT.—July 25, 1836.

Pearce *v.* Vincent.

Notwithstanding a Person is made Tenant for Life, he may take under the ultimate Limitation to the nearest Relation or Kin of the Testator, living at his decease.

Richard Pearce, by his will, dated the 30th of March, 1813, devised certain freehold and copyhold estates, in the counties of Hertford and Northampton, Leicester, or elsewhere, unto his cousin, Thomas Pearce, and his assigns, for life; and subject thereto, he gave the same, and all other his real and personal estate, after the decease of Thomas Pearce, to such of his relations of the name of Pearce, being a male, as his cousin, the said Thomas Pearce, should, by deed or will, give, devise, or bequeath, nominate or appoint the same to; and, in default of such gift, &c., by his said cousin, Thomas Pearce, to or in favour of any such male relation of him, the testator, of the name of Pearce as aforesaid, then he devised the said estates and premises to such of his, the testator's, relations of the name of Pearce, being a male, as the said Thomas Pearce should approve of or adopt for the purposes of education, (which the testator authorized and directed the said Thomas Pearce to do as soon as he could conveniently after his, the testator's decease,) if he should be living at the time of the decease of his said cousin, Thomas Pearce, and his heirs, executors, administrators, and assigns, for ever; and in case the said Thomas Pearce should not have approved of or adopted any such male relation as aforesaid, or in case he should have made such approval or adoption, and there should not be any such male relation living at the time of the decease of the said Thomas Pearce, then he devised the said estates and premises unto the next or nearest relation or nearest of kin of him, the testator, of the name of Pearce, being a male, or the elder of such male relations, in case there should be more than one of equal degree who should be living at his, the testator's, decease, his heirs, executors, administrators, or assigns, for ever. The testator then gave the first presentation of

the rectory of Husband's Bosworth which should happen after his decease to persons therein named, and in case of their not presenting, then the rectory was to belong to Thomas Pearce to present during his life.

And the testator gave all his plate, &c., to Thomas Pearce for life, and afterwards for the persons who should succeed to or inherit the testator's real estates under or by virtue of his will; and the testator directed Thomas Pearce to pay so much of the rents and profits of his estates given to him for life as aforesaid, not exceeding the annual sum of £200, as he in his judgment and discretion should think proper, for and towards the maintenance and education of such person, being a male relation of him, the testator, of the name of Pearce, whom his said cousin should approve of and adopt in manner aforesaid, in case such male relation should be under age, and invest the residue of the £200, for the purpose of accumulation, in trust, for the benefit of such male relations of the name of Pearce, and the same, with the dividends and interest, should be assigned to him, at such times and in such proportions, after he should have attained the age of twenty-one years, as his said cousin, Thomas Pearce, his executors, or administrators, should think most to his advantage; and in case of his death before attaining twenty-one years of age, then in trust for the benefit of such male relation of the name of Pearce as should, upon the decease of his, the testator's, cousin, become entitled to his, the testator's, estates, by virtue of his will; and, in case such male relation of the name of Pearce, so approved of and adopted by his said cousin, Thomas Pearce, as aforesaid, should in the lifetime of his said cousin, attain twenty-one years of age, then he directed Thomas Pearce, during his life, to pay, out of the rents and profits of the estates devised to him for life, unto such male relation, from the time of his attaining twenty-one years of age, the whole of the said sum of £200. And the testator authorised the said Thomas Pearce to lease the estates for a period not exceeding seven years, at rack-rents.

The testator died in 1814, leaving Thomas Pearce, aged sixty-seven, and Richard Pearce, aged sixty-six, sons of two of the testator's uncles, and William Pearce, aged fifty-nine years, brother of Richard. Thomas Pearce died without issue, in 1827, and without exercising his power of appointment, or adopting any person, and devised his real estate to a stranger.

The question was, whether Richard Pearce, or Thomas Pearce, took under the limitation to the nearest relation, or next of kin, of the testator?

The case was argued before Sir John Leach, in 1832, and his Honour directed a case to be sent to a court of law. A case was sent to the Court of Exchequer, in which it was stated, that the testator had a brother, named Zachary, who had gone to sea, and had not been heard of for many years.

The judges returned a certificate that if Zachary Pearce, the testator's brother, died without issue in the lifetime of the testator, Thomas Pearce took under the ultimate limitation in the testator's will an estate in fee simple in the testator's real estates, and an absolute interest in his personalty.

The case went back to the Master of the Rolls, who was dissatisfied with the opinion of the judges, and directed another case to be sent to the Court of Common Pleas.

The judges of that court returned a certificate to the same effect as that of the judges of the Court of Exchequer.

On the cause coming back to be heard on the last certificate, most of the arguments formerly urged were again recapitulated, and the same cases cited; but, in addition, the defendants cited *Elmsley* v. *Young*, *Holloway* v. *Holloway*, *Jones* v. *Colbeck*, *Doe* v. *Lawson*.

The Master of the Rolls, in giving judgment, said that as there had been opposite decisions on the subject,—one decision by Sir John Leach one way, and two decisions by two courts of law the other way,—he was placed in rather an embarrassed situation, and he had to form his own opinion; but, in doing so, he had no doubt on the opinion which he had formed.

The question was, whether Thomas Pearce, being devisee for life, and also filling the character of a particular class of persons to whom the testator had given the estate, after that estate for life, excluded him from taking in that character? His Lordship, having read the will, said—The words "shall be living at my decease" are not contravened by the devise to the persons to whom the gift is made in default of appointment, because the devise in default of appointment applies to the persons who should be adopted by Thomas Pearce: he does not adopt any person; and his Lordship was of opinion that there was a vested interest in the person who answered the description of nearest relation or nearest of kin of the name of Pearce living at the testator's decease, which might be displaced by the appointment or adoption by Thomas Pearce, and, in default of such appointment or adoption, that interest would take effect at the time of the death of the testator, and if it happened that Thomas Pearce, who was the devisee for life, would answer that description, does it follow, that, because he is tenant for life, that he should not take? It was argued, that, because it is given to a tenant for life, it is inconsistent with the intention of the testator that he should have it, and that the testator intended to give it to some persons at that time unknown, and that, if, at that time, they were not unknown, he would have mentioned them in his will, and that, therefore, it was his intention that nothing should pass to Thomas Pearce. Notwithstanding this reasoning, his Lordship thought that the testator intended that the person who answered the description at the testator's decease should take, notwithstanding he should happen to be the tenant for life, for it

is given to such person, his heirs, executors, administrators, and assigns, for ever. And his Lordship was of opinion, that the true construction of the will was that Thomas Pearce was absolutely entitled.

Counsel.—Mr. Wright and Mr. Rogers, for the plaintiff; Mr. Pemberton, Mr. Preston, and Mr. Kindersley, for the defendant; Mr. Girdlestone for the trustees, and Mr. Montague and Mr. Bevan for other parties.

Cases cited.—*Pearce* v. *Vincent*, 2 M. & K. 800; *Cholmondeley* v. *Clinton*, 2 J. & W. 1, 2 Mer. 348; *Elmsley* v. *Young*, 2 M. & K. 82; *Holloway* v. *Holloway*, 5 Ves. 399; *Jones* v. *Colbeck*, 8 Ves. 38; *Doe* v. *Lawson*, 3 East, 378; *Bird* v. *Wood*, 2 Sim. & Stu. 400.

JULY 27, 1836.

TULLETT *v.* ARMSTRONG.

Clause against Anticipation in two Wills, where the Party taking was unmarried at the Date of the Will and Death of the Testator, and where she was unmarried at the Date of the Will, but married at the Death of the Testatrix.

This was a motion on behalf of the plaintiff, that the defendants, William Armstrong and Mary Augusta, his wife, might be restrained from receiving the rents and profits of the freehold, copyhold, and leasehold estates devised by the wills of Nathaniel Bradford and Ann Bradford; and for a receiver.

Nathaniel Bradford, by his will, dated 27th March, 1820, devised and bequeathed certain copyhold and leasehold estates to trustees, upon trust, after the death of his wife, to pay or permit and suffer his granddaughter (the defendant, Mary Augusta Armstrong, in his will called Mary Tilt, spinster,) to receive the rents and profits thereof for her life, and in such manner that his granddaughter should not anticipate or dispose of her life interest, and so that neither any husband or husbands of his said granddaughter should acquire any right or control over the said life estate; nor should the same be liable to the debts or engagements of any husband with whom she might marry; and the testator declared that the receipts of his said granddaughter, notwithstanding any coverture, should alone be sufficient discharges to his trustees for the same; and the testator further declared that the devises and bequests contained in his will in favour of his said granddaughter were to be free from the control, debts, or engagements of any husband that she might marry, and were to be taken and received by his granddaughter as if she were sole and unmarried, and so to be holden and enjoyed by her.

The testator died in 1820; and at the date of his will and of his death, his granddaughter was unmarried; but, after his death, she married the defendant, William Armstrong; but no settlement was made on her marriage.

By the will of the testatrix, Ann Bradford, a devise of certain freehold hereditaments was made to trustees, upon trust, for the said Mary Augusta Armstrong, (in the will called Mary Augusta Tilt,) for her life, and which devise was in all respects similar to that contained in the will of Nathaniel Bradford.

At the time of the death of the testatrix, Mary Augusta Armstrong was a feme covert, but at the date of the will was a feme sole.

In March, 1832, the defendants, William Armstrong, and Mary Augusta, his wife, granted and appointed unto the plaintiff, during the life of Mary Augusta Armstrong, an annuity of £31 : 17, and charged the copyhold and leasehold estates devised and bequeathed by the will of the testator, Nathaniel Bradford, and also the freehold hereditaments devised by the will of the testatrix, Ann Bradford, with the payment thereof.

In September, in the same year, the defendants, William Armstrong and his wife, granted unto the plaintiff, during the life of the wife, a further annuity of £31 : 17, and charged the same upon the same estates.

The annuities were duly paid down to the month of December, 1834.

In February, 1835, the defendant, William Armstrong, was discharged under the Insolvent Debtors' Act, and the defendant Samuel Weller was appointed his assignee, who contended, by his answer, that the clause contained in the will of Nathaniel Bradford to the separate use of Mary Augusta Armstrong, the insolvent's wife, she being then unmarried, was nugatory, and the restraint against anticipation void; and that the insolvent, on his marriage, became entitled to the gift; and that the assignee was entitled thereto, subject to the plaintiff's annuities.

For the plaintiff it was contended, that the clause against anticipation was void, as, at the death of the testator, Nathaniel Bradford, the party was unmarried, and there was no marriage in contemplation, and that there was no limitation over, in case of anticipation. In support of this argument, the several cases of *Newton* v. *Reid*, *Barton* v. *Briscoe*, *Woodmeston* v. *Walker*, *Jones* v. *Salter*, *Brown* v. *Pocock*, *Massey* v. *Parker*, *Davies* v. *Thornycroft*, and *Stiffe* v. *Everett*, were cited; and it was contended, that the Lord Chancellor considered the point as settled in *Newton* v. *Reid*.

For the defendants, Armstrong and wife, it was submitted that the point was too important to be decided on motion, and that the authorities cited were in opposition to the doctrine declared by Sir John Leach and Lord Eldon; and the cases of *Sockett* v. *Wray*, *Brandon* v. *Robinson*, and *Beadle* v. *Dodd* were cited; and it was remarked that the cases of *Davies* v. *Thornycroft* and *Jones* v. *Salter* were no authorities; and that the judgment in *Massey* v. *Parker* was an *obiter dictum*.

In reply it was observed that the cases of *Sockett* v. *Wray*, *Brandon* v. *Robinson*, and *Beadle* v. *Dodd*, were distinguishable from the present case; and that the cases settled "that where the party is married at the date of the gift, the clause against anticipation is entirely operative; but where the party is unmarried, the clause against anticipation is void."

The MASTER OF THE ROLLS said he would read the wills, and consider of his judgment.

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His Lordship stated that he had read over the will of the testator, Nathaniel Bradford, and that he was of opinion that the plaintiff was entitled to an injunction and receiver as to the estates devised by that will, but not as to the property devised by the will of Ann Bradford.

Counsel.—Mr. Teed, for the plaintiff; and Mr. Wray, for the defendants.

Solicitors.—Mr. W. T. Clarke, for the plaintiff; and Mr. Sanger, for the defendants.

Cases cited.—*Newton* v. *Reid*, 4 Sim. 141; *Barton* v. *Briscoe*, Jac. 603; *Woodmeston* v. *Walker*, 2 R. & M. 192; *Jones* v. *Salter*, 2 R. & M. 208; *Brown* v. *Pocock*, 5 Sim. 663; *Massey* v. *Parker*, 2 M. & K. 174; *Davis* v. *Thornycroft*, *ante*, p. 13; and *Stiffe* v. *Everett*, *ante*, p. 18; for the plaintiff; and *Sockett* v. *Wray*, 4 Bro. C. C. 483; *Brandon* v. *Robinson*, 18 Ves. 429; and *Beadle* v. *Dodd*, 1 T. R. 193, for the defendants. *Vide Johnson* v. *Freeth*, *ante*, p. 16, not yet reported.

VICE-CHANCELLOR'S COURT.—JULY 12, 1836.

MEUX *v.* BELL.

Where a Person advances Money to a Husband on the Deposit of a Bond, the Subject of the Settlement of the Personalty, and only looks at the Settlement of the Realty, which alone was shown to him, and which does not refer to the other Settlement, and without making Inquiries of the Obligor, who was a Trustee of the Settlement of the Realty:—Held, *not to have used due Diligence.*

The following question arose on a bill of interpleader:—It appears that two settlements were made on the marriage of Miss Jefferys with H. Jordan. One settlement comprised the real estates of which T. S. Beesom was a trustee; and the other a bond for £8000, which was payable to Miss Jefferys, and of which T. S. Beesom was an obligor, but was not a party to this settlement. The settlement of the real estates did not refer to the settlement of the bond. It appeared that Jordan, the husband, by some means, obtained the bond from his brother, who was one of the trustees, and with whom it was deposited; and having possession

of the bond, he applied to Mr. Bell to advance him £7000 on the security of the bond, which he claimed as his own in right of his wife; and on inquiries being made by Mr. Bell as to any settlement having been made, the settlement of the real estate alone was produced. Mr. Bell was satisfied with this, and advanced the money, and took a deposit of the bond with a memorandum of deposit. The question was, whether he had used due diligence in the transaction?

For Mr. Bell it was contended, that no notice of the settlement was given to the obligor of the bond; and that, though the settlement was for the separate use of the wife, the interest was paid to the husband, and that he was permitted to have the custody of the bond at the time he dealt with Bell; and that it was natural for Mr. Bell, on seeing that there was no settlement of the personal estate referred to by the settlement of the real estate, to suppose that it was intended that the husband should take the bond absolutely.

The VICE-CHANCELLOR.—If it was intended that the husband was to take absolutely, it ought to have been noticed in the settlement, because there is a great difference between barring the wife's equity by settlement, and letting it alone, and allowing the husband to take; because, if it was not barred, and she survived, she would have it, though, of course, he has the power of reducing into possession.

COUNSEL.—Your Honour says, that it is the ordinary thing to state this in the settlement.

The VICE-CHANCELLOR.—Yes. Especially in a case of this sort.

COUNSEL.—It does not appear that T. S. Besom knew of the settlement. If we had gone to him, we should have found that he knew nothing about the settlement; and we should have been informed that the interest was paid to the husband.

The VICE-CHANCELLOR.—T. S. Beesom and another person were the persons who took the whole estate in fee which was the subject of the settlement of the real estate, and he being the trustee, it appears very singular that when Bell knew that he was a trustee of the settlement, and that he was a trustee before the settlement, and one of the obligors of the bond, no application was made to him. This settlement commenced by reciting the will of the grandfather, in which he devised the estates to T. S. Beesom and others, giving him the legal estate in trust, by which Miss Jefferys became entitled by survivorship; and by the settlement the estates are conveyed to three persons, one of whom is Beesom, to hold to them in fee, so he became a trustee for her; and as he was an obligor, an application to him would have relieved the matter; where there were large sums, and, ordinarily speaking, where there was a settlement; and if it is meant that the husband should become entitled absolutely to the choses in action of the wife, to express the fact.

After a few more observations from counsel,

The VICE-CHANCELLOR, in giving judgment, said—It appears to me, if it should turn out as a fact that T. S. Beesom did not know of the settlement of the bond, it would be material; *primâ facie*, it appears to me, if, in point of fact, T. S. Beesom did know of the settlement made of the bond, there is so much apparent on the face of the settlement of the real estate, coupled with what is on the face of the bond, to show that Bell did not make proper inquiry; as to who was in possession was not material. T. S. Beesom appeared to be one of the obligors; and on the face of the settlement of the real estate a strong supposition arose that this T. S. Beesom was nearly related to Miss Jefferys. The real estate which was the subject of the settlement was derived from the grandfather, and he devised the real estates to T. S. Beesom and another in fee, upon trusts, by which Miss Jefferys took the benefit by survivorship; and the settlement recited that fact; and by the settlement the estates were so conveyed as to give the legal estate to T. S. Beesom and another trustee; the bond to secure £8000 does not appear in the settlement of the real estate. As to the husband becoming entitled to the wife's choses in action, the reasonable inference to be drawn is, that if there was a settlement of the real estate, that there was a settlement of the personal estate also. I cannot but think that it must forcibly appear that, if an inquiry had been made of T. S. Beesom, he would have been able to state what the case was. It was quite obvious what the husband said was not true. It appears to me, Bell has not exercised sufficient precaution. You may, if you think it desirable, take an inquiry, whether, at the time of your taking the bond, T. S. Beesom knew of the bond. It appears to me, under the circumstances, he was the person pointed out, of whom the inquiry ought to have been made.

Counsel.—Sir William Horne, for the plaintiffs; Mr. Temple, for the wife and children; Mr. Barker and Mr. Turner, on the same side as Mr. Temple; the Solicitor-General and Mr. Bethell, for Mr. Bell.

AUGUST 1, 1836.

WOODYATT *v.* GREISLEY.

A Person having improperly obtained Possession of a Trust-Fund, the Subject of a Marriage Settlement, in which she had a Life Interest, and afterwards assigned her Life Interest in other Property, the Subject of the same Settlement and of another Settlement bearing even Date, such Assignee, (having had Notice of such Abstraction,) was restrained from receiving the Rents, &c., and a Receiver appointed, even before Answer put in.

By indentures bearing date the 13th and 14th days of June, 1796, made on the marriage of Sir Nigel Bowyer Gresley, Bart., and Dame Maria Eliza Gresley, then Maria Eliza Garway, spinster, certain hereditaments in the counties of Worcester and Hereford,

(the property of the said Lady Gresley,) were appointed and conveyed to R. Ingram and Samuel Collett, upon trust, to pay the rents, &c., to the separate use of the said Lady Gresley for life, and, after her decease, for Sir Nigel B. Gresley for life, and, after the decease of the survivor of them, in trust, for the children, in manner therein mentioned. Lady Gresley then assigned the sum of £2609: 19*s.*, Old South Sea Annuities, to the trustees, (subject to the life interests therein of her mother and aunt,) upon trust, for her separate use for life; and, after her decease, then to the children, (except an eldest or only son,) as she should appoint; and in default of appointment, in trust for the children equally, except as aforesaid.

By other indentures of settlement made on the marriage, bearing even date with the last indentures, the said Sir N. B. Gresley conveyed certain hereditaments in the county of Stafford to the use of himself for life, and, after his decease, in trust, to secure a jointure of £800 to his intended wife. In 1808, Sir N. B. Gresley died, having had three children of the marriage, besides Sir Roger Greisley, one only of whom survived, (viz.,) the defendant, Louisa Georgiana Maria, who, in 1819, attained the age of twenty-one years, and became entitled to the £2609: 19*s.*, South Sea Stock, (being the only child, except an eldest son,) subject to the life interest of her mother. Miss Gresley married Edward Woodyatt in 1822, on which occasion the South Sea Stock was settled for the benefit of the husband and wife and their children: there were six children of the marriage. In 1813, (her mother and aunt having died,) Lady Gresley procured the South Sea Stock to be transferred (without the knowledge of the trustees) to herself, instead of to them.

By indentures dated the 26th of June, 1830, Lady Greisley assigned to Sir Roger Greisley her jointure of £800 and the rents, &c., of the hereditaments situate in the counties of Worcester and Hereford, comprised in the settlement of 1796, to secure advances made by Sir Roger Greisley. Notice of Lady Greisley having obtained a transfer of the South Sea Stock was denied by Sir Roger; whereas the plaintiffs attempted to show that various conversations and correspondence had taken place between Sir Roger Griesley and his attorney on the subject of the sale of the Stock.

Sir Roger Greisley had changed his surname, by adding the letter *i* to it.

The trust-estates devolved on Martin as sole trustee.

This was an application for a special injunction to restrain Lady Gresley and her son, Sir Roger Greisley, from receiving the rents and profits of the estates situated in the counties of Worcester and Hereford, and the jointure of £800, the subject of the settlements of 1796. No affidavit was made in answer to the affidavit of the plaintiffs.

The present suit had been instituted by the plaintiffs, together

with their trustees, with a view of having the South Sea Stock replaced out of Lady Gresley's life interest in the estate in question, and out of the rent-charge.

No answer had then been put in.

For the plaintiffs it was alleged, that, on the occasion of the assignment by Lady Gresley to Sir Roger, in 1830, she was imprisoned in the King's Bench Prison, at the suit of certain judgment creditors. On that occasion Sir Roger advanced £5000 to satisfy the claims of her creditors. He was to receive the rents and profits, without accounting; but she was to be at liberty to redeem, by paying the £5000, without interest. Sir Roger was also to allow his mother £500 a-year out of the rents and profits. It was further alleged, that the estates in question produced £1700 a-year, and the rent-charge was £800 a-year, which Sir Roger had received for five or six years.

In support of the plaintiff's claim was cited the cases of *Priddy* v. *Rose* and *Ex parte Turpin*.

For the defendants it was contended, that a motion for a receiver or for an injunction against receiving rents, &c., was never allowed before answer put in, except under very peculiar circumstances, which did not exist in this case. It was denied that Sir R. Greisley had notice; and that if he had notice, still he had a priority over the plaintiffs, by having purchased the judgment-debts; their claim, by reason of a breach of trust, being only a simple contract debt; and that, if the judgment creditors had taken possession, a court of equity would not have ousted them; that Sir Roger had taken a security upon Lady Gresley's life interest only, at a time when her life was so bad that no insurance office would insure her life.

On the other hand it was contended, that, if Lady Gresley would not be allowed to receive her life interest, the creditors would not be permitted.

The Vice-Chancellor, in giving judgment, said—The peculiarity of the case consisted in this, that it was sought, (in respect of what might be called a fraudulent abstraction of the South Sea Stock, which, with a rent-charge and life interest in real estate, were made the subject of the settlements of 1796,) to proceed against the person, who, at law, had become entitled to the rent-charge, which was granted by settlement of even date; and also to proceed against the possession of the land, the legal estate of which was vested in the possession of Martin, who represented one of the trustees of the settlement of 1796.

Now the question would be, whether, inasmuch as, by the settlement of 1796, Lady Gresley had professed to grant and assign the South Sea Annuities to trustees, on the trusts of the settlement under which the plaintiff had become entitled to the stock, and she afterwards, at the time when her right came into possession, obtained a transfer of the stock to herself, whether there was not now an equity as against the other property comprised in the

settlement to be reimbursed in respect of the abstraction of the South Sea Annuities. It was settled in bankruptcy; and the question had arisen more than once, that, where a person, being tenant for life of a trust fund, had himself, by connivance with the trustees, obtained possession of the trust-fund and become bankrupt, the proper course was to direct that the trustees of the settlement should receive the interest and dividends produced by virtue of the proof in respect of the life-interest of the bankrupt, in order, if possible, to replace the trust-fund. In *Ex parte King*, I had directed a proof against a bankrupt's estate in respect of an abstraction of stock in which he had a life interest, but made no order that interest and dividends should be received by the trustees, in order to recompense themselves the whole amount abstracted. This was an oversight, from my attention not having been called to the subject; but it was afterwards rectified upon an appeal to the Lords Commissioners. That was a case where the jurisdiction in Bankruptcy had proceeded against that thing which represented the fund itself, which was made the subject of the fraud. But in the case of *Ex parte Mitford*, Lord Thurlow went further. He directed that the trustees of a settlement, to whom the bankrupt had not paid a sum of money he had covenanted to pay by settlement, should be at liberty to retain a certain interest in annuities to which the bankrupt was entitled as tenant for life; and the jurisdiction in bankruptcy extended the right to another fund which was the subject of the settlement, from which there was the fraudulent abstraction. Thus, Lord Thurlow thought that the other fund being made subject to the trusts of the settlement, did, so far as the bankrupt had an interest, become liable to make good this default he had made in the covenant to pay the trustees. The only difference between this case and *Ex parte Mitford* is, that there the persons who were entitled to have proof under bankruptcy claimed to have the legal disposition over the fund the subject of the settlement; in this case, as to part of Lady Gresley's estate, the subject of the first settlement, Martin has merely the legal estate, and no possession.

The question as to the rent-charge would be, whether there was not an equity on the part of those who claim under the settlement to say, that Lady Gresley and those who represent her, (having notice of what she had done,) were not compellable to make good the fraud she had committed?

It appears to me, that it would be inconsistent with the rules of the court to say, that the legal rent-charge would not be liable to make good the fraud if she had possessed herself of a part of the property settled. I should consider it perfectly clear, that, inasmuch as she derived the rent-charge by a deed of even date, which not only bore even date, but was meant as part of the same transaction, and does, in fact, refer to the deed which contained the settlement as to the South Sea Annuities, it must be considered

precisely as if Sir Nigel B. Gresley had made a settlement of his Staffordshire estates, and as if the two deeds formed one conveyance. If the equity would arise against Lady Gresley, the question was whether it did not continue as against Sir Roger, who took under the indenture of the 26th of June, 1830; and whether it was clearly shown that, at the time when he entered into the transaction with his mother, that he was aware of what she had done as to selling out the stock. The letter which had been produced by the plaintiffs was a confession by him that, at the time he advanced the £5000, he had made inquiries what had become of the stock. It appears to me, that the equity which would have existed against her as to the rent-charge, applied with more force as to the Worcestershire and Herefordshire estates, because the legal estate was in the trustees; and this Court must put the trustees in possession by directing an ejectment, if an ejectment would succeed, or by directing a bill to be filed. It appears to me, that the question is, whether, the equity existing, the Court is not called on to interfere, in order to have the fund restored, the fund depending merely on the continuance of a life? and whether, (on the facts appearing which are stated by the affidavits produced by the plaintiffs, and the non-production of affidavits by the defendant,) Sir Roger Greisley ought to be allowed to receive the rent-charge and the rents of the estates, or whether I must grant the injunction?

It appears to be clearly right to grant the injunction, and to consider the receiver as merely auxiliary to the injunction.

His Honour then directed the case to stand over till Saturday, in order to enable Sir Roger (if he chose) to make an affidavit in answer to the plaintiffs' affidavit.

Counsel.—Mr. Treslove, for the children; Mr. Knight, for the trustees; Sir Charles Wetherell and Mr. Hayter, for Sir Roger Greisley; and Mr. Bird, for Lady Gresley.

Cases cited.—*Ex parte Mitford*, 1 Bro. C. C. 398; *Priddy* v. *Rose*, 3 Mer. 105; *Ex parte Turpin*, 1 Dea. & Chitty, 120.

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Sir C. Wetherell again applied to dissolve the injunction, and that the appointment of receiver might not be confirmed; which was refused, with costs.

NOVEMBER 5, 1836.

CAVE *v.* ROBERTS.

Where a Person who is illegitimate dies intestate, leaving a Widow and no Issue, half of his Personal Property goes to the Widow, and the other half to the Crown.

This was a petition for leave to file exceptions to the Master's report.

The petition stated, that John Curtis, the testator, by his will,

gave all the rest and residue of his real and personal estate to be divided between certain societies in the city of Bristol in equal shares; he then appointed his wife, M. Curtis, and other persons, executrix and executors. The testator died, and the will was proved by the executors. His estate consisted of personalty, of realty, and of leaseholds in the nature of realty; and as to so much of the gift to the charities as was void by the Statute of Mortmain, an intestacy occurred, *pro tanto*.

The cause was heard in June, 1833, and a reference made to the Master to ascertain who was the testator's next of kin; he found that there was no next of kin, the testator having been illegitimate. The widow died, and left the petitioner her personal representative.

For the petitioner it was contended, that, by the statute of 31 Ed. 3, c. 11, the ordinary was to grant administration to the nearest and most lawful friends; and by the 21 Henry 8, c. 5, he was required to grant administration either to the widow or the next of kin, or to both; but there was no provision as to the distribution of the effects; consequently, after payment of debts, the administrator was entitled to retain for his own benefit; but, by the Statute of Distributions, 22 & 23 Car. 2, c. 10, the widow was to have one moiety, and the next of kin the other. Thus she would take one moiety under the statute, and as there was no next of kin, she would take the other moiety according to the law which existed before the 22 & 23 of Car. 2; and that Mr. Justice Blackstone, in his Commentaries, vol. 2, p. 515, in writing of an administrator, observes—"Concerning whom, indeed, there formerly was much debate whether or no he could be compelled to make any distribution of the intestate's estate. For though, (after the administration was taken in effect from the ordinary, and transferred to the relations of the deceased,) the spiritual court endeavoured to compel a distribution, and took bonds of the administrator for that purpose, they were prohibited by the temporal courts, and the bonds declared void at law. And the right of the husband not only to administer, but also to enjoy exclusively the effects of his deceased wife, depends still on this doctrine of the common law, the Statute of Frauds declaring only that the Statute of Distribution does not extend to this case." And as the equity followed the law, it has been decided that whoever takes out administration is trustee for the husband. You cannot, therefore, apply that rule in the case of a husband, and not of the wife; therefore, if an illegitimate husband died, leaving a wife, and administration is granted to A. B., he is trustee for the wife.

The VICE-CHANCELLOR, having made up his mind, did not call on the counsel on the other side to reply; but said, that, in whatever way the question would arise, if there be no persons to answer the character of next of kin, the Crown is entitled; and I believe it

to be so completely undenied as to be received as the law of the land. Thirty years ago, if the same question had come before me as counsel, I should not have hesitated in saying, that the Crown was entitled to the moiety not given to the widow. If, as it appears, the received opinion of Westminster Hall has been in a given form for a number of years, I shall not upset it. What I mean is this, where a man is illegitimate, and dies without issue, and leaves a wife, and the wife administers the estate, she is entitled to one moiety under the statute, and the other goes to the Crown.

Counsel.—Mr. Wigram and Mr. Wilbraham, for the petitioner, and Sir W. Horne and Mr. Knight, for other parties; but they did not address the Court.

Registrar.—Mr. Hussey.

Nov. 7, 1836.

RANKIN *v.* WEGNELIN.

Interest not allowed to Tenant for Life under Circumstances.

This was a petition, praying (amongst other things) that two sums of money, secured by two bills of exchange, might be paid into court and laid out, and that a Mrs. Wegnelin might be allowed a sum of money in respect of interest thereon.

Colonel Wegnelin, by his will, directed that his trustees should realize certain sums of sicca rupees which were due to him by the East India Company, and invest them in the 3 per cents., and should pay the dividends to his wife for life.

The East India Company contracted with the trustees to repay the money borrowed at the rate of 2*s.* 6*d.* for each rupee, and gave two bills payable at twelve months' date.

Mrs. Wegnelin sought to have interest at the rate of 4 per cent. paid to her on the two sums secured by the bills, which produced no interest.

For Mrs. Wegnelin it was observed, that one year having to elapse before the bills were paid, the East India Company agreed to allow 2*s.* 6*d.* for the rupee instead of 2*s.* 1*d.*, its real value; and that as there was a gain of 5*d.*, the tenant for life ought to be allowed some compensation for the loss of interest; otherwise, she would be a whole year without income, and the residuary legatee a gainer of 5*d.* on each rupee.

The VICE-CHANCELLOR said that he had no jurisdiction in this case. If interest had been made payable by a bill, then the tenant for life might have had a claim; but if the bill was for an increased amount of principal as a compensation for the lost time, it would fall into the residuary estate.

The order was allowed to be taken as prayed, without computation of interest to the lady.

Counsel.—Mr. Hull, for Mrs. Wegnelin, and Mr. Hayter, for the trustee.

Registrar.—Mr. Fry.

Nov. 5, 1836.

FARQUARSON *v.* BALFOUR.

A continuing Consignee has no Lien on the Corpus *of the Estate for the Balance of his Account.*

In this case, the petitioner was the consignee, appointed by the Court, of certain West India estates; and, on the accounts being taken, it appeared that there was a balance due to him, in respect of his consigneeship, of about £3000. This sum the consignee desired should be paid out of the compensation-money awarded in respect of the slaves on the estates by the commissioners under the Compensation Act; and he accordingly put in a claim before the commissioners. He did not offer to give up his consigneeship. There were mortgages on the estates.

For the petitioner it was contended, that the petitioner had a lien not only on the produce of the estates, but on the *corpus* of the estates; and that a consignee stood in a better position than a mortgagee. In support of this argument, the case of *Scott* v. *Nesbitt* was cited. And it was further contended, that, if consignees had no claims on the *corpus*, nobody would be a consignee, especially in the disastrous years of the West Indies, where he had to advance large sums of money; and that, such was the nature of West India estates, that it was most for the interest of the mortgagees of the estates that that rule existed, otherwise the estates could not be preserved.

For the owners and mortgagees it was contended, that the case of *Scott* v. *Nesbitt*, (which had been cited,) was a question between tenants in common as to whether one had a lien on the other; that no case had ever occurred in which the Court had allowed a continuing consignee to come upon the *corpus* of the estate.

The VICE-CHANCELLOR having asked if any case could be produced in which the Court had directed that the balance due to a consignee should be paid out of the corpus of the estate, and no other case having been produced,

His Honour said—It appears to me that no precedent had been produced in favour of granting such a petition. I can readily understand that such a case might occur where a final balance was found due, because it may be that he should not be discharged from the consigneeship without being paid. Persons entitled to West India estates could not discharge their consignees without paying what was due to them; and if the payment could not be had otherwise, why the inheritance must stand a security to the amount in favour of the consignee displaced. *Scott* v. *Nesbitt* was a case in which a question arose between the owners, tenants in common, whether one should not, in fact, bear the expenses of both. It was quite obvious many cases must have existed similar to the present, in which petitions would from time to time have been presented if the parties thought they would have succeeded. If such a petition had been presented, there must, of necessity,

have been somebody who could give information respecting it; but there was nobody who recollected such a case, which was a sufficient reason for supposing that such a case did not exist. I cannot but think that it would create great inconvenience, where there was a balance in favour of a consignee, if the Court was to say, the plantation, of necessity, ought to be disposed of to pay the balance. It appears to me what was proposed would be inconvenient, and as, at present, nothing was shown to the contrary, the petition cannot be sustained. There would be a great deal of injustice, if, every time there was a balance due, the consignee might call upon the Court to sell a portion of the inheritance. It appears to me it tends to establish a very inconvenient mode of proceeding. The petition must be dismissed, with costs.

Counsel.—Mr. Stuart, for the petitioner, and Mr. Jacob, Mr. Jemmett, Mr. Richards, Mr. Stinton, and Mr. Koe, for the proprietors and the mortgagees.

Case cited.—*Scott* v. *Nesbitt*, 14 Ves. 444.

Registrar.—Mr. Hussey.

Nov. 8, 1836.

GETHING *v.* VIGURS.

The making a Trustee, having only a scinctilla juris, *a Plaintiff, is not a sufficient ground for Demurrer.*

A general Demurrer for want of Equity is the proper way of taking the Opinion of the Court as to whether Persons are improperly made Parties.

A husband, without taking out Administration to his Wife, cannot file a Bill in respect of her Property pur autre vie, *which had been limited to her, with others, as Tenants in common, not mentioning their Heirs.*

This was a demurrer to a bill which had been filed against Sir J. Vigurs and several other persons; and it prayed that the defendants might be restrained from making excavations, &c., on the demised premises, on account of the mines, &c., belonging to the same.

The bill stated that Lord Vernon, being possessed of property in Glamorganshire, made a lease of it to a person named Cooke and his heirs for three lives. In this lease there was a reservation of certain rights as to minerals. The benefit of the reservation became vested in the defendants, by assignment from Lord Vernon.

It further alleged, that the defendants threatened to make use of the reservation in a manner different from what they were entitled to do.

This was a general demurrer for want of equity, put in by all the defendants except one.

The way the plaintiffs alleged that they derived their interest was this:—By the will of Cooke, his interest became vested in

three persons as tenants in common. These persons, by indentures of lease and release made in 1822, conveyed and assigned two thirds to two trustees, (the survivor of whom was the plaintiff Richards, in trust for W. Gething for life;) and after his decease, for his wife, Mary Gething, for life; and after the decease of the survivor, in trust, as they should jointly appoint; and, in default of such appointment, as Mary Gething, in case she survived her husband, should appoint; and, in default of such appointment, in trust, for the children of W. Gething and Mary his wife, as tenants in common. The bill stated that W. Gething and Mary his wife had nine children.

Mr. Jacob and Mr. James, for the demurrer, contended that Thomas Richards, the surviving trustee, ought not to have been made a plaintiff, inasmuch as that he had no interest in the property.

Mr. Knight and Mr. E. J. Lloyd, in support of the bill, contended that it was stated in the bill that the property was conveyed to the trustees "in trust." This meant, (according to the familiar application of the word,) that they were to have the legal estate; and this position was strengthened by the subsequent part of the bill, where Richards was called "surviving trustee;" and that a trustee, in this court, meant a person who has an estate.

The VICE-CHANCELLOR said, that, if A, seised in fee, conveyed to B. and his heirs, in trust for C., the legal estate would vest in C., notwithstanding the word "trust" was used: and calling him trustee in a subsequent part of the bill would not make him so.

They further contended that the *scinctilla juris* would be sufficient to support the interest; that if it was held that no legal estate remained in the trustees, it would be leaving the legal estate to result in case there were no children at the time the deed was executed.

The VICE-CHANCELLOR said, that he was clearly of opinion, that the legal estate was not otherwise vested in Richards, except by *scinctilla juris*.

Mr. Jacob, in reply, contended that there was no authority to show that *scinctilla juris* was sufficient to support a bill in equity; that, in the present day, it was considered that *scinctilla juris* did not exist.

The VICE-CHANCELLOR said, if a power of appointment existed, there must be some estate in the trustee to serve the appointment.

Mr. Jacob said that Mr. Saunders, in his book on uses, argued against it. Trustees, to preserve contingent remainders, had an estate, but they could not be made parties; they might file a bill under certain circumstances, where they had to exercise their powers to preserve the trust, but they could not otherwise file a bill; that Richards had no possibility of a legal estate arising in him; the legal estate (if at all) must pass through him and out of him in an instant.

Another objection was, that J. K. the husband of Mrs. K., a de-

ceased daughter of Mr. Gething, was made a party. The reason of the objection was, that as the limitation to the children as tenants in common, did not extend to their heirs, the interest, *pur autre vie*, would belong to the representatives of the wife, as special occupants, and not to the husband.

On the other side, it was contended, that the husband would have the beneficial interest in the estate of the wife; that, in fact, by the way it was argued, on the other side, it could more properly be called a demurrer for want of parties, and that the cause of demurrer ought to have been pointed out.

On the other side, it was contended, that the case of the *King of Spain* v. *Machado* decided that it was not necessary, in a general demurrer for want of equity, to set out the cause.

The VICE-CHANCELLOR said he was quite certain as to that.

As to J. K., it might possibly have happened that his wife might have left debts contracted *dum sola;* therefore J. K. would be only in the position of the next of kin, where administration had been taken out by another. Suppose a case, in which a person having personal property, died intestate, and left a sole next of kin, the next of kin would be beneficially interested after payment of debts. Suppose the next of kin filed a bill in his own name for the recovery of debts, there would clearly be a general demurrer for want of equity. In *Rhodes* v. *Warburton*, there was a reason why the demurrer was not allowed, because the executor joined another person with him. The executor there was the only person who filed the bill; here, no person had made J. K. a plaintiff, but he has filed the bill himself; and if he had a right to file it with others, he had a right to file it alone, which would not be allowed.

The VICE-CHANCELLOR said, he admitted that a general demurrer for want of equity was the proper way of taking the opinion of the Court as to whether persons were not improperly made plaintiffs.

It appeared to his Honour, that Thomas Richards could not, (from what appeared on the face of the bill,) be fairly stated to be a person having no interest; because, looking at the deed, there was a conveyance to him and another of a freehold estate for lives, in trust, for the plaintiff for life, and then to the plaintiff's wife for her life; and then, in trust, as the husband and wife should appoint; and then there was a limitation over, in case the wife survived, in trust, for such person as she should appoint; and, in default of appointment, for the children of the plaintiff. There was nothing on the record that showed that there were no children at the time of the execution of the deed. Even suppose that there were no children, it was quite clear that the whole legal seisin was intended to be conveyed to the trustees, and the uses could not be said to be drawn out of them, until an appointment was made; and, if an appointment was made, it would draw out the whole legal estate. His Honour thought that the survivor of the

trustees still remained to support the uses, until the power of appointment was exercised. It occurred to him that there might be a substantial objection in respect of J. K. The objection stood in this way:—The estate in question, being an estate *pur autre vie*, was limited to certain persons as tenants in common, and a married woman was one of the tenants. It was not a limitation to them and their heirs, but to them as tenants in common only; the share of the deceased married daughter would, therefore, be in the nature of personal estate; and, on her death, the person entitled to administer would be the person who represented her. Notwithstanding what was said in the bill about administration, the question was, whether the husband, (having no actual right at law, unless that sort of right which might exist to call upon the person who might happen to take out administration to the wife, in case the husband did not do that himself, that the whole interest might fairly be handed over to him,) has such an interest as could be sustained by the bill? There was nothing contained in the bill to show that the husband had any such interest. His Honour said he knew nothing about the situation of the wife before her marriage; she might then have incurred debts, and involved the estate. It appeared to him to be a different thing in the case of *Rhodes* v. *Warburton*, where a person who was executor joined with him a residuary legatee. The objection as to J. K. was, therefore, an objection which could be sustained; therefore, the demurrer must be allowed. But his Honour gave leave to amend generally.

Case cited.—Rhodes v. *Warburton*, 6 Sim. 617.

Nov. 15, 1836.

PRICE *v.* DEWHURST.

Where a Bill had been filed to set aside a foreign Will, and establish an English Will, it was held necessary to have the Representatives, according to the English Law, of the Parties beneficially interested, before the Court; though the foreign Representative had possessed himself of the Property abroad.

The Order "to stand over, with Liberty to add Parties," does not preclude the Plaintiff from filing a Supplemental Bill.

In this case, a husband and wife, living in the island of St. Croix, within the Danish dominions, made a joint will, and each a separate will. The separate will was proved in England, and the joint will was established in the island of St. Croix. According to the English will, Mrs. Hennessey and the plaintiff, Mrs. Price, were residuary legatees and joint executrixes, and, consequently, entitled each to one half; but, under the Danish will, Mrs. Price was only entitled to a quarter.

The bill had been filed by Mrs. Price, (who had survived her co-executrix,) against the Danish executors, and against the legatees under the Danish will; and the bill alleged, that the parties who

made the wills were domiciled in England, and the object of the bill was to recover the property received in the island of St. Croix, under the joint will.

It appeared that the property in the island of St. Croix, had been divided between several persons who claimed to be entitled under the Danish will; and a sum of 35,185 rix-dollars were adjudged to the defendant, Henry Seaton, in right of himself and Mrs. Hennessey, by the court established in the island; which court was of the nature of the prerogative courts in this country.

Mr. Jacob and Mr. Sutton Sharpe, for the demurrer, contended, that the question could not be decided, unless the representatives of Mrs. Hennessey, according to the English law, were before the Court.

Mr. Knight and Mr. Bethell, for the bill, contended that the Danish executors being before the Court, was sufficient, and that Henry Seaton, who represented Mrs. Hennessey in the island, having been made a defendant, and the person who, in fact, had got the property, it was unnecessary to bring any other person representing her before the Court, as she had only a beneficial interest.

The VICE-CHANCELLOR said that, if it was intended to set aside the Danish will by the English will, it was necessary to have the representatives of Mrs. Hennessey, according to the English law, before the Court. He accordingly ordered the cause to stand over, with liberty to add parties. His Honour stated that that was the general form of the order of the Court; and that if a plaintiff had a case which justified a supplemental bill, he would not be precluded by that order from filing the supplemental bill.

Registrar.—Mr. Walker.

Nov. 15 & 16, 1836.

EVANS *v.* JACKSON.

Where a Lessee has Notice that he is not to expect the Production of the original Lessor's Title, and he proceeds with the Agreement notwithstanding, it is a Waiver of his Right to the Production.

A Bequest of Leaseholds to Executors, in Trust, to sell, will not authorize them to lease.

The plaintiffs, in this case, were the executors of the late Thomas Oldham, and the defendant was Mr. Jackson. The prayer of the bill was, that a certain agreement to take an underlease might be performed by the defendant.

Mr. Oldham was possessed of a leasehold house in Acre Lane, Brixton, which he bequeathed to his executors, in trust, to sell. The testator died in 1832; and, two months afterwards, the plaintiffs, the executors, put the house up for sale, and the particulars described it as held for a lease, of which seventy-six years and a quarter were unexpired, at the annual rent of £104 for the first

two years and £110 for the residue of the term; the tenant to insure for £1200; the tenant's fixtures to be taken at a valuation; the purchaser to have a proper assignment of the lease, but he was not to require a production of the lessor's title. At this sale the executors could find no bidders, but Mr. Jackson seemed desirous of purchasing.

On the 29th of March following, Mr. Jackson wrote a letter to Mr. Forster, (one of the executors,) offering to take the house for seven, fourteen, or twenty-one years, at the rent of £130. This offer was not accepted. Mr. Jackson, immediately afterwards, made another offer, which was accepted. An agreement was accordingly made, dated the 29th of March, (being the same day the offer was made,) between Rowland Evans and J. Forster, "executors of the will of Thomas Oldham," of the one part; and Mr. Jackson, of the other part, "the said executors hereby agree to execute to W. Jackson a good and sufficient lease of all that messuage," &c., for the whole of the term, wanting a few days, at the rent of £120; such lease to contain all the covenants contained in the original lease, and it was to commence at Midsummer then next; and the lessee was to execute counterparts, and pay the expenses, and to take "the last tenant's fixtures." On the signature of this agreement, Mr. Jackson, with the consent of the executors, took possession, and continued in possession ever since. At this time, a valuation was made of the fixtures, and Jackson laid out £90 in repairs, the draft of the lease having been prepared and approved of, when, (as it was alleged,) owing to a dispute between the solicitors of the parties, the solicitor for the purchaser wrote, on the draft, a requisition for the production of the probate of Mr. Oldham's will. At first, an objection was made to its production, but it was afterwards produced. He then raised an objection in respect of the executors having only a power of sale; and he also called for the production of the lessor's title. This was resisted by the plaintiff's solicitor; and, thereupon, the defendant having refused to perform his part of the agreement, the plaintiff filed his bill. It appears that there had been also some dispute as to whether the greenhouse was to be taken at a valuation; and in the course of the dispute, Mr. Jackson wrote a letter to his solicitor, dated the 19th of April, in which he stated, as a reason for the greenhouse not being tenant's fixtures, was, that they were not so considered in the particulars and conditions of sale under which the executors first attempted to sell the property.

Mr. Knight and Mr. Chandless, for the plaintiffs, contended, that the defendant entered into the contract with full notice that the plaintiffs were selling as executors; that there was nothing in the agreement which gave a right to look at the lessor's title; it was a contract to give a "good and sufficient lease;" the defendant had notice, and entered into possession unconditionally. He had entered into the contract with the knowledge that it was lease-

hold, and that the production of the lessor's title was provided against in the conditions of sale, of which the defendant had notice, and to which he referred; that it could not be said, that these executors were to be personally liable, and could not deliver themselves by an underlease, if they could not sell; that executors supplied the place of the testator, and they had the same rights as the testator; that the executors had improved the property by receiving an increased rent, after every attempt had been made without success, to execute the trusts by sale; and that the defendant did not ask for the lessor's title till after the lease had been approved of, and the fixtures valued; consequently, as it was not asked for in proper time, the defendant had no right to call for it afterwards. In support of these arguments, the case of *Ogilvie* v. *Foljambe* was cited.

Mr. Jacob and Mr. Russell, for the defendants, not having been called on to reply,

Nov. 16.

The Vice-Chancellor, this day, on entering the court, said that he had looked at the case of *Ogilvie* v. *Foljambe*, which decided, that an intended purchaser waived his right to obtain the lessor's title where he proceeded with the agreement after full notice that the title was to be taken on that footing.

It appeared, in this case, that the purchaser had notice of the particulars of sale, which declared, by the fourth condition, that the purchaser should not require the investigation of the lessor's title.

But as to the power to lease, he did not think that the executors had any such power; the authority was to sell.

Mr. Knight.—They have, as executors, put the property up for sale; and, as they cannot sell, have they not a power to decline accepting the trusts?

The Vice-Chancellor.—The executors' authority is to sell, and not to lease.

Mr. Knight.—They sell as executors.

Vice-Chancellor.—I know that.

Mr. Knight.—Admitting that the executors cannot make a lease, which I should question, the title has been accepted, and the objection has been waived. What I contend is, that, if the executors cannot sell, they are not to be made liable for the rent. It is a species of sale which they have made; and your Honour decided, that perpetual leases of property in the neighbourhood of Manchester were a species of sale; and it would be the same thing in this case. The executors are not bound to accept the trust; you cannot make them trustees, without their assenting to their own legacy. There was no proof that they had assented.

The Vice-Chancellor.—The circumstance of their selling shows that they must have assented.

Mr. Knight.—We submit that they have not assented to the

bequest; they sell only as executors. In point of law, an executor, by taking out probate of the will, accepts the trust—*Mucklow* v. *Fuller;* yet they may, as executors, sell any portion specifically bequeathed without accepting the trusts. A testator of personal estate cannot fetter the executors. The right of executors to lease is laid down in Bacon's Abr. tit. Lease, 136. In the case of *Mead* v. *Lord Orrery*, it was settled that executors, *qua* executors, had a right to sell, and that whoever took from the executor, took with notice of the will; even supposing they were held to have accepted the trust, they had attempted to sell, but could not.

The VICE-CHANCELLOR said—There was no doubt that, according to law, the executors might lease; but here there is a trust that the executors shall sell. *Primâ facie*, they may lease; but the circumstances in this case are such, that they cannot diverge from the trust, and equity will bind them to it. However, it does not appear that there is a case before me sufficient to judge of the question. I must have the *cestui que trust* before me. I cannot otherwise enter into the consideration as to what the executors are entitled to do, or of their right to compel the purchaser to take the title, subject to the ordeal of another suit, which the *cestui que trust* might commence for the purpose of establishing their rights. It does not appear to me that the intention of the parties, at first, was to object to the title, or that either party thought that an objection existed. I cannot decree specific performance. All I can do is to dismiss the bill, but without costs.

Registrar.—Mr. Walker.

Cases cited.—*Ogilvie* v. *Foljambe*, 3 Mer. 53; *Mead* v. *Lord Orrery*, 3 Atk. 243; *Mucklow* v. *Fuller*, 1 Jac. 198.

ROLLS' COURT.—APRIL 22 & 23, & AUGUST 5, 1836.

SHAW *v.* BORRER.

Trustees and Executors, (though they be different Persons,) if they join together may sell an Advowson under a general Direction by a Testator that his Debts should be paid, even though the Advowson was devised to the Trustees for special Purposes.

Sir John Gregory Shaw, by his will, dated the 13th of April, 1831, first directed his debts, funeral, and testamentary expenses be paid, after his decease; he then devised the rectory of Hurstperpoint, in Sussex, unto and to the use of his son, John Kenward Shaw, and John Cornwall, their heirs, and assigns upon trust, to present his youngest son, Robert William Shaw, to the same, when it should become vacant; and, subject thereto, in trust, to sell the said advowson, in manner therein mentioned, and to pay the monies to arise by such sale, (after defraying the expenses,) equally between all his daughters who should then be single and unmarried,

in equal proportions, share and share alike; and he directed that the receipts of his trustees should be sufficient discharges to purchasers. He then gave a certain leasehold house and some furniture in favour of his unmarried daughters, and, after the decease or marriage of all his daughters, in trust for his eldest son.

To this bequest was annexed a power of sale, under certain circumstances, and a direction that the purchaser should not be liable to see to the application of the purchase-money. He then appointed his estates to go to Maximilian Dudley Digges Dalison and John Cornwall, and their heirs, in trust, with all convenient speed, after the death of the testator's wife, to convey and settle the same to the use of the testator's eldest son, John Kenward Shaw, and the heirs male of his body, with several remainders over. The testator, after making several other bequests, positively declared that the shares of the child of any of his children should not vest till 21. And the testator appointed John Kenward Shaw and Robert William Shaw and his brother, the Reverend John Kenward Shaw Brooke, joint executors.

The trustees, by an agreement, dated the 27th of October, 1832, contracted to sell the advowson to the defendants, and delivered an abstract of title.

The defendants, having examined the title, objected to it on the ground that the time for sale had not arrived.

A bill was accordingly filed by the trustees and executors together, for the specific performance of the agreement, and praying, that the purchase-money might be paid to the executors.

The Master, (to whom the cause was referred,) having approved of the title, the defendants excepted to his report.

Mr. Tinney and Mr. Hodgson, for the exceptions, contended, that the words "subject thereto" meant, after the advowson had become vacant, and the presentation taken place; and, as the testators youngest son had not been presented to the living, the period for sale had not arrived; and that the Court would not allow a premature sale; and that, even if the period had arrived, there might then be no unmarried daughters; consequently, it would fall into the residue. This the testator had directed to be strictly settled; and, consequently, a trust executory, which was strengthened by the declaration that there should be no vesting till twenty-one; that it did not appear that J. R. Shaw, the testator's eldest son, (on whom the strict settlement was to be made,) was even married, much less that he had any children who had attained the age of twenty-one years; and that, consequently, the proper consenting parties were not in *esse*, or not in a situation to join in the conveyance: and that, as the trustees were to sell for specific purposes, the purchase-money ought not to be paid to the executors. That, as the contract had been entered into by the trustees, the bill could not be filed by the trustees and executors; that the testator had not given the trustees power to pay debts; that the sale could

not be effected unless under a decree of the Court, inasmuch as it could not otherwise be ascertained whether there was a deficiency of personal assets; that, without such suit, no evidence which the plaintiffs could produce was sufficient to show that there was a deficiency of assets; that they could not sell on the mere ground of charge. Supposing the contract had been entered into by the executors, according to the case of *Esdaile* v. *Stephenson*, they could not call upon the trustees to convey the legal estate, unless under very peculiar circumstances.

In support of these arguments, they cited the cases of *Pierpoint* v. *Lord Cheney*, cited by Fearne; *Countess of Lincoln* v. *Duke of Newcastle*.

Mr. Pemberton and Mr. G. Simpson appeared in support of the bill; Mr. Simpson confining himself exclusively to the second question, (viz.) as to the general charge authorizing a sale; and the arguments applicable to that question were chiefly urged by him. They contended that the words "subject thereto" meant, that the sale was to be made subject to the presentation, and not after the presentation; that there was no reason for postponing the sale; that if they could prove a deficiency of the personal estate, the executors could sell and call upon the trustees to convey. That Sir Edward Sugden, in his last edition of Vendors and Purchasers, vol. 2, p. 47, took it as a disputed point, whether there was a distinction between a devise in trust to sell, to pay debts, and a general charge that there ought to be no distinction between the two. That no principal had been stated, that a sale could not be made without a decree and taking accounts in the Master's office; that, according to the case of *Spong* v. *Spong*, this devise was specific, and not residuary; that it was a settled rule of court that there was no necessity to have the deficiency of assets ascertained in a court of equity, and that the purchaser was not bound to ascertain that; that the cases were collected in Sugden's last edition of Vendor and Purchaser; and that the amount of the debts precluded all question as to necessity of the sale. That the power of an executor to sell his testator's property was recognized by the courts to avoid the inconvenience of a suit.—*Ewer* v. *Corbett*, *Langley* v. *Lord Oxford*, *Farr* v. *Newman*, *Humble* v. *Bill*, Butler's n. Co. Litt, 206. And the same principles were followed as to real estates in *Lloyd* v. *Baldwin*, *Doran* v. *Wiltshire*, *Watkins* v. *Cheek;* and the case of a charge was expressly said to be within the same principles in *Elliott* v. *Merryman*, *Newman* v. *Johnson*, *Green* v. *Belcher*, *Allen* v. *Backhouse*, *Booth* v. *Blundell;* therefore, much more did a general charge authorize a sale. And that, where there was a charge, the purchaser was not bound to see that the personalty was exhausted.—*Elliott* v. *Merryman*, *Dalton* v. *Hewen*. Nor was he bound to see to the application of the purchase-money.—*Walker* v. *Smallwood*, Sug. V. P. 7th ed., p. 517. But it was held

otherwise in the case of a trust.—*Omerod* v. *Hardman*. But that case, however, was condemned by Lord Eldon in *Jenkins* v. *Hiles*. That executors and trustees, acting on their own responsibility, might take steps in the administration of assets without the Court. *Walker* v. *Smallwood*. That a purchaser was not obliged to see to the application of his purchase-money where the trust was to sell so much as would make good the deficiency of the personalty.—Butler's note, Co. Litt. 206; *Jenkins* v. *Hiles*, *Earl of Bath* v. *Earl Bradford*. That a charge for payment of debts over-rode every disposition, *Shallcross* v. *Finden*; and made it the same as if there was no specific bequest.—*Jenkins* v. *Hiles*. The legal estate was not affected by a charge.—*Hargreaves* v. *Tindall*. And in a creditor's suit, where there was a charge, the heir was ordered to convey. That specific performance was decreed against a purchaser in two cases of a charge for debts where the executors and trustees of the estate were the same parties.—*Barker* v. *Duke of Devonshire*, *King* v. *Shrives*, *Newman* v. *Johnson*, and *Dolton* v. *Hewen*. That, according to the authority of *Shallcross* v. *Finden*, *Jenkins* v. *Hiles*, and *King* v. *Shrives*, the charge of debts, the devise of the legal estate, and the appointment of executors, would authorize the trustees who had the legal estate, and the executors who had the charge and represented the creditors, to make a good legal, and equitable title. That as the executors and trustees, being the same parties, could sell for payment of debts, could not the executors and trustees together do the same where they were different individuals? And that the principle laid down in *Shallcross* v. *Finden* and *Jenkins* v. *Hiles* was quite independent of the identity of the executors and trustees. If specific performance could not be enforced in such cases, a charge of debts rendered a title unmarketable.

Mr. Tinney, in reply, said, that a general charge was not even held to be a provision for creditors until the case of *Clifford* v. *Lewis*. Before that time, the opinion of Lord Eldon, in *Trent* v. *Hanning*, was to the contrary. In *Renvell* v. *Whittaker*, it was established, that a general direction for payment of debts was not binding on executors as executors. That effect could not be given to such a direction without the aid of a court of equity, though it might be allowed where the trustees and executors were the same persons. If the advowson was to be sold first, an important trust would be defeated.

The money might be raised by mortgage, in which case the mortgagor would have to present. Thus the trusts of the will would not be defeated.

AUGUST 5.

The MASTER OF THE ROLLS, in giving judgment, said—This bill was filed for the purpose of compelling a specific performance of an agreement, whereby the defendants contracted for the purchase

of an advowson from two of the plaintiffs; and by a decree made the 21st April, 1834, it was referred to the Master to inquire whether a good title could be made; and, if so, when such title was first made; and the Master reported that a good title was made the 18th of December, 1832. To this report the defendant has filed two exceptions; and the cause was heard on the first, which alleged that the Master ought to have certified that a good title could not be made.

The advowson in question was the property of Sir John Gregory Shaw, who made his will, dated the 13th of April, 1831; and under that will the question arises. It commences thus—"First I direct," &c. That these words created a charge on the real estate was not denied.

His Lordship then read the remainder of the will, and proceeded—

The contract was entered into by the plaintiffs, the trustees of the advowson, and, as the bill alleges, in concurrence with, or rather, at the request of, the executors, to raise money to satisfy the debts of the testator. The defendant denies, however, all knowledge of this, and insists that he contracted with the trustees only, and that he has nothing to do with the executors; and, under these circumstances, the reasons the defendant has assigned for his first exception, are, in substance, as follows:—1st. That no vacancy having occurred in the living, and the testator's youngest son not having been presented, the time designated for selling the advowson has not yet arrived. 2dly. That if a good title could be made, it could only be with the consent of the persons having a beneficial interest in the advowson; and that, if sold, even at the time appointed by the will, there are not proper parties in *esse* to make a good title to it, if sold. 3dly. That no proper evidence was adduced before the Master to show the deficiency of the personal estate and the amount of property to answer his debts, and to prove the necessity of the present sale, or to justify the Master in stating that a good title could be made.

Now, upon the best consideration I have been able to give, with reference to the first reason, it seems to me at least probable, that the testator did not intend it to be sold until they had presented his youngest son to the living, (that is,) that the sale was intended to be made subject to the incumbency of the youngest son; and the money arising from the sale was intended for the daughters who were unmarried at the time the sale took place, whenever the proper time came.

Now there might be no unmarried daughters at the time; and, if so, the advowson would fall into the residuary estate, and become subject to the limitations; on which, questions of some nicety might arise, as to giving a mere life interest to the persons in *esse*.

Under these circumstances, I think, if there was no title to sell, (except that of the trustees, of the advowson, for the purpose of

the special trust reposed in them,) the Court cannot properly compel a purchaser to accept the title.

But then another title to sell is claimed. It is alleged, (and, for any thing I have heard to the contrary, truly alleged,) that the contract was entered into, at the instance of the executors, for the purpose of raising money to pay debts. I do not think it very material that the executors were not privy to the contract personally, though one of the vendors was both executor and trustee, and all the other executors are co-plaintiffs with the trustees.

In this state of things we are brought to the consideration of a question of considerable importance, there being a general direction to pay debts, so expressed as to constitute a charge on the testator's real estates, and there being, in the same will, a devise of a particular portion of the real estate to the trustees for special purposes, and a residuary devise of real estates for other special purposes, and no suit in equity to ascertain the deficiency of the personal estate to pay the debts; can the trustees and executors together make a title to a purchaser of that part of the real estate devised to the trustees for special purposes? That such a sale could be effected under a decree of a court of equity, obtained by a creditor for the administration of the testator's estates, is not denied; but it is argued, it is that way alone a valid sale could be effected.

For the purpose of considering the question, it is necessary to inquire whether, on a sale taking place, the purchaser would be liable to look to the application of the purchase-money. Now, in *Elliot* v. *Merryman*, reported in Barnardiston's Reports—(His Lordship then read the whole of that case, and also the case of *Walker* v. *Smallwood*,) and proceeded to observe, that, in the latter case, Lord Camden, after saying that creditors have a right to call on the heir or devisee to execute the trusts, (treating the charge as a trust in that case, and treating it as a rule, that where the charge is general, the purchaser is not bound to see to the application of the purchase-money,) expresses himself thus:—"Though a general charge does not make the purchaser before the suit see to the application of the money; yet, after a suit commenced, I should hold him bound by it; and I hold it as a general rule, than an alienation pending a suit is void." So that he considered in the same manner as was considered in the case of *Elliott* and *Merryman*, that a purchaser is not bound to see to the application of the money. *Elliott* and *Merryman* has been referred to in various other cases, and always referred to with approbation.

We find, also, Lord Eldon saying, in an argument in *Jenkins* v. *Hiles*, reported in 6th Vesey—"If a man, by deed or will, charges or orders an estate to be sold for payment of debts generally, and then makes specific dispositions, the purchaser is not bound to see to the application. It is just the same as if the specific bequests were out of the will." It seems, therefore, clear, that a charge of

this nature has been, and ought to be, treated as a trust which gives to creditors a priority over the special purposes of the devise; and no doubt is raised but that, on the application of the creditors, the Court would, in a suit to which the executors were parties, compel the trustees for special purposes to raise money for the payment of the debts. If so, is there any good reason to doubt that the trustees and executors may themselves do that which the Court would compel them to do on the application of the creditors. Although the advowson, in this case, is given to the trustees for special purposes, yet the testator has charged all his estates with the payment of his debts. The charge affects the equitable, not the legal estate. And, in point of construction, the trusts of the will affect this estate; first, in connexion with the testator's other property, for the payment of debts; and next, separately, for the special purposes mentioned in the will. Possibly, on the testator's death, it might not be necessary to resort to the real estate at all for the payment of the testator's debts; and if it should be necessary to resort to the real estate, some part ought, on a due administration, to be applied to the payment of debts before other parts. It is said, there is a necessity for raising money to pay debts out of the real estate; and, (if the necessity exists,) the proper selection of that part of the real estate which ought to be first sold ought to appear, and can only be proved by the Master's report in a suit for the administration of assets. It is true that, if the administration devolves on the Court by the institution of a suit for the purpose, the Court, in the exercise of its jurisdiction, acts with all practicable caution, and proceeds in strict conformity with its own established rules; but this is a caution exercised not for the benefit of the creditors, because they have nothing to seek but the payment of their debts. The question is not what the Court thinks it right to do for the benefit of the persons who claim, subject to the payment of debts, but whether an estate, subjected to the payment of debts by will, if sold by the devisees for a special purpose, at the instance of the executors, would remain in the hands of a purchaser, subject to any claim created by or founded on the will; or whether there is any obligation on the purchaser to see that done which the Court would do in a suit for the administration of assets?

An argument is attempted to be deduced from the statute which makes real estates assets for the payment of simple contract debts; but it does not seem to me that the rule the legislature has thought fit to apply in a case where the real estates are not charged, is necessarily to be applied in a case where the testator has charged his real estates with such payments. And upon the whole, considering that the charge creates or constitutes a trust for the payments of debts; or, as Lord Eldon, in one case, adopting the language of Lord Thurlow, expresses it, "a charge is a devise of an estate in substance and effect by a testator, in trust, to pay debts." And

conceiving that the purchaser is not bound to inquire whether there is either sufficient property as applicable, or which ought to be applied first to the payment of debts, or to see to the application of the purchase-money, I think the first exception must be overruled.

Cases cited, in support of the bill.—*Ewer* v. *Corbett*, 1 P. W. 148; *Langley* v. *Lord Oxford*, 2 Amb. 797; *Farr* v. *Newman*, 621; *Humble* v. *Bill*, 2 Vern. 444; Butler's note Co. Litt. 206; *Lloyd* v. *Baldwin*, 1 Ves. 173; *Doran* v. *Wiltshire*, 3 Swans. 701; *Watkins* v. *Cheek*, 2 S. & S. 205; *Elliott* v. *Merryman*, 3 Barn. 81, which is recognized in *Bonny* v. *Ridgard*, 1 Cox, 148; *Newman* v. *Johnson*. 1 Vern. 45; *Green* v. *Belcher*, 1 Atk. 505; *Allen* v. *Backhouse*, 2 V. & B. 15; *Booth* v. *Blundell*, 1 Mer. 232; *Dolton* v. *Hewen*, 6 Mad. 10; *Walker* v. *Smallwood*, 2 Amb. 676; Sugden V. & P. 7th edition, p. 517; *Omerod* v. *Hardman*, 5 Ves. 723, p. 732 & 735, condemned in *Jenkins* v. *Hiles*, 6 Ves. 654; *Earl of Bath* v. *Earl Bradford*, 2 Vez. 586; *Shallcross* v. *Finden*, 3 Ves. 738; *Hargrave* v. *Tindall*, 1 B. C. C. 136; *Barker* v. *Duke of Devonshire*, 3 Mer. 311; *King* v. *Shrives*, 5 Sim. 461; *Spong* v. *Spong*, 1 Y. & J. 300; *Clifford* v. *Lewis*, 6 Mad. 33.

Cases cited in favour of the exceptions.—*Esdaile* v. *Stephenson*, 6 Mad. 366; *Countess of Lincoln* v. *Duke of Newcastle*, 12 Ves. 218; *Pierpoint* v. *Lord Cheney*, 1 P. W. 488; *Trent* v. *Heming*, 10 Ves. 495; *Henvell* v. *Whitaker*, 3 Russ. 343.

LORD CHANCELLOR'S COURT.—Nov. 19, 21, & 23, 1836.

Turner *v.* Turner.

Will—Construction of.

This was an appeal from a decision of the Vice-Chancellor; and though it is a case depending on its own particular merits only, and, consequently, not coming within the plan of this work, yet, as we have made a short note of it before, at p. 62, we shall give the judgment of the Lord Chancellor on the appeal, and refer to a full abstract of the will of the testator, William Turner, which will be found in 4 Sim. 430.

Nov. 23.

The Lord Chancellor, having read the will, said, that the question was, what interest the children attaining twenty-five had in the accumulation of income which might arise from the investment of the surplus income of the other shares of the children until they attained twenty-five? The decree was, that the child, being an eldest, who attained twenty-five, should have his share without sharing in the subsequent accumulations. The decree proceeded on the principle that the child attaining twenty-five was to have two sixteenth parts of the income to be derived out of the residuary personal estate. This, however, could not be the case; because,

according to the form of the will, the interest must necessarily be variable, because the expenses of the real estate were to be paid out of the personal estate. Thus, the income might be diminished; and as it might be diminished, so it might be increased by £500 a-year falling in on the death of the mother; and on another event £1000 would fall in; so that the child, on attaining twenty-five, would be entitled to the increase or decrease, as the case might be. Two accumulations were directed by the will; first, of the surplus of the annuities to each child, beyond the maintenance, until they attained twenty-one; and in the other case of the surplus income of his real and personal estate, until they should attain twenty-five (that is,) till all attained that age; and if any were under that age, some portion of the accumulations must be going on. That the accumulations should go on, after some attained the age of twenty-five, was evident, for he directed, that "as and when," &c., that is, that the income of the personal estate should consist, in part, of the accumulations during all such period as any child should be under the age of twenty-five years; but the decree is, that the eldest should not have any of the subsequent accumulations after he should attain the age of twenty-five; therefore as the accumulations would be going on at a continual increase, the youngest son would ultimately have more than the testator intended he should have. The testator intended that the income of the personal estate should be divided into sixteenths. If, at the death of the testator, they had all been of the age of twenty-five, the income might then have been divided properly, but as some of the grandchildren were infants, the division did not come into operation till the eldest attained twenty-five.

His Lordship was therefore of opinion, that the decree of the Vice-Chancellor would not be right; but that the true construction of the will was, that, as each child attained twenty-five, he should be entitled to his share, including his share in the accumulations, while the youngest child remained under the age of twenty-five.

Counsel.—Mr. Wakefield and Mr. James, for the appellant; to whom was opposed Mr. Knight and Mr. Chandless; and Sir W. Horne appeared for the trustees.

Nov. 14 & 15, 1836.

CAMPBELL *v.* MACKAY.

Demurrer for Multifariousness.

This was an appeal from the decision of the Vice-Chancellor in the case of a demurrer for multifariousness, the Vice-Chancellor being of opinion that the bill was not multifarious.

On the marriage of Sir James Campbell with Lady Dorothea Campbell, a settlement was executed, in which a sum of £11,000 stock was invested in the names of four persons, of whom Colonel Mackay and Colonel Campbell were the two surviving trustees, and were also two of the demurring parties. The trusts were for

the benefit of Lady Dorothea Campbell, and, on her death, for the children.

In this settlement was contained a provision, empowering Sir James Campbell, by deed or will, executed in the presence of two witnesses, to appoint guardians of the persons and fortunes of the children, who, together with the trustees of the settlement, should have a power, after the decease of Sir James and Lady Dorothea Campbell, to maintain and advance the children of the marriage.

The bill stated a post-nuptial settlement of a sum of £10,000 stock, which was invested in the names of the Marquis of Sligo and Colonel John Holmes Holmes, the latter of whom was another demurring party; and the trusts were for Lady Dorothea Campbell for life, with a power of appointment amongst the children.

Sir James Campbell afterwards made his will, by which he gave the residue of his property to Colonel Campbell, Colonel Mackay, and Colonel Holmes, upon trust, for his wife and children. The testator then appointed Colonel Campbell, Colonel Mackay, Colonel Holmes, and Lady Dorothea Campbell, guardians of his children.

The bill had been filed by Lady Dorothea Campbell and her children against all the trustees, praying that the trusts of the settlement might be carried into execution, and that two new trustees might be appointed under the first settlement. To this bill a joint demurrer was put in by the trustees of the first settlement and one trustee of the second settlement, (viz.) Colonel Holmes; but Lord Sligo did not join in the demurrer.

Sir William Horne, Mr. Wigram, and Mr. J. Russell, for the demurrer, contended that the settlements and the will were three distinct transactions, inasmuch as that the trustees, the trusts, and the amount of property, were different in each instrument; and that, therefore, three bills ought to have been filed; that it was quite clear that Lord Sligo had nothing whatever to do with the other instruments; and that, if he had the right to demur, (though he had not taken advantage of it,) still the others, having been joined with him in the bill, had also a right to demur.

It was further contended, that the Vice-Chancellor admitted that it would have been multifarious, had it not been for the clause as to appointing guardians, which, he said, connected the three transactions; this, however, they contended, could not be the case, because the appointment of the guardians did not refer to the power; that it was simply an appointment of guardians of the infants' persons, under the statute, and not their fortunes; and that their powers could only take effect in case they happened to survive Lady Dorothea Campbell, which might not so happen. In support of these arguments, several cases were cited, which are mentioned below.

Mr. Temple and Mr. Parry, for the bill, contended, that three suits would put the infants to a great expense; that the persons appointed

guardians were guardians of the property as well as the persons of the infants; and that making them guardians constituted them trustees of the settlement—*Beaufort* v. *Berty;* and that the trustees of the will and settlements were as much connected as if they had been named in one instrument; that the infants were interested in the funds contained in all the instruments; they formed together the fortune of the infants, and it was derived from one source, (viz.) their father; that Lord Sligo did not object to the bill; that there was no inconvenience in joining them in one suit; and that, in the case of infants, the Court was not bound by strict rules; that the cases cited on the other side did not apply to this particular case; that it must be decided on the principle laid down in Mitford's Pleading, 4th ed., by Jeremy, 181-2, 3. That, in cases of demurrer, if there was a doubt, it was allowed to go to a hearing; that if a person entered into three different contracts with another, one bill would do for the three; that the rule was, that so long as you could contain all the parties in the four corners of the same instrument, you could maintain one bill; that, in this case, all the parties were so connected as to come within that rule; and that the defendants could not put in a demurrer in respect of Lord Sligo.

The Lord Chancellor, in giving judgment, said—The question was, whether it was competent for the plaintiffs having a common interest to file a bill against the trustees under the three different instruments, who were not the same trustees in all the different instruments? It was proposed, on the part of the demurring parties, as a general rule, (though it was a rule which ought not to be supported.) The rule alluded to was laid down by Sir John Leach in *Dew* v. *Clarke*, that he never permitted a bill for distinct matters to be united in one record. If this was the rule, it would go to exclude a bill being filed by the same persons interested in property vested in trustees under three several deeds, although the same parties were interested, and the property vested in the same trustees, in favour of the same children, and upon the same trusts; and it would be necessary to have as many suits as deeds. This was a matter in which his Lordship disagreed, and all the authorities were against it, as it very much tended to give rise to a multiplicity of suits. It was not his Lordship's intention to lay down any rule as to what would amount to multifariousness; that was impossible, because all the cases varied; the Court had, therefore, to consider what authority could conveniently be applied to any particular case. In this case, however, there was no decision directly in point, and the misfortune was, that, if you attempted to lay down a rule from the decisions, you must fail. It was the least possible mode of attaining correctness in science, to attempt laying down rules, for in many cases they must necessarily lead to error. In the case reported in Sim. & St., the Court was not speaking there as to the acknowledged rule as to multifariousness; but the Vice-Chancellor was applying his observations to the particular

case before him. The case was this. His Lordship then went through the case. The only way of reconciling the cases as to multifariousness was to consider what rule the case approached the nearest to. Although the word multifariousness was generally used, yet it might, in point of fact, be divided into two distinct heads, (viz.) multifariousness and misjoinder. It was misjoinder, where the defendant might object to be joined in one record by saying, "I am not interested in the subject of the suit." This excuse would form the demurrer; for he objects to being joined in the suit; for, by his being united in one record, he would be put to useless expense for copies of instruments in which he had no interest. This would be a mere misjoinder, because he had no interest. It was properly illustrated in the case of *Ward* v. *The Duke of Northumberland.* (His Lordship then read that case and the case of *Harrison* v. *Hogg*, which, he observed, was also a case of misjoinder; and so were the cases of *Saxton* v. *Davis* and *Salvidge* v. *Hyde.*) His Lordship observed, that no case had been produced in which there was a common interest in the plaintiffs, and where the defendants represented all different interests; but, on the other hand, an authority happened to be produced to show that the Court would not allow a suit to be instituted for different matters. On examining all the authorities it would appear that the courts have not gone to that length, but that they have always exercised a discretion as to whether the subject-matters were properly joined. It was not very easy to lay down any rules on the subject of multifariousness; the only way of judging of a case was to see under what particular class of cases the case came. A strong case as to multifariousness occurred in *Attorney-General* v. *Merchant Tailors' Company.* (His Lordship then read the case.) Now the case of *The Attorney-General* v. *The Goldsmiths' Company*, which was decided by the present Vice-Chancellor, was grounded on the same principles; and, in giving judgment, he showed that he considered that rule as the rule to be acted on. (His Lordship here read the case.) The case of *Turner* v. *Robinson*, decided by the present Vice-Chancellor, was also a strong case. He could not concur in the propriety of that decision: it showed, however, how the latter decisions dispute the objection of multifariousness. His Lordship then read the case. Now another case was referred to—*Knye* v. *Moore;* that also was held not to be multifarious. And in the case of *Kensington* v. *White*, the defendants having a common interest were seventy-two persons; yet it was held not to be multifarious. It was not necessary to push the case to the length of the several cases; but the case was simply this:—There were three instruments, under which each of the plaintiffs were interested; but all the defendants were not trustees in respect of all the instruments, because two were trustees of one instrument, and one a trustee of another. The argument at the bar would go to show

that such different instruments could not be united in one bill, because all the defendants did not represent the same instruments. The Vice-Chancellor overruled the demurrer; and his decision seemed to go on the ground of the provision contained in the deed; whereas it was argued that the guardians appointed by the will were not equally trustees of the deeds, but only to be admitted to come in and distribute the funds for the purpose of maintenance and advancement after the death of the mother. There was quite sufficient in the provision to remove any doubt of the propriety of uniting the several claims into one bill; but he did not wish to have it supposed that he should have allowed the demurrer if the provision had not been inserted; but that provision removed any doubt. He did not think it made any difference, that the clause might not come into operation till after the death of Lady Dorothea. There could be no doubt but that it would operate as to the guardians who might happen to survive, who would have the power to execute the trusts for the benefit of the children. He thought that it was very important that the true bearing of the cases should be understood, and that it would be very desirable if they could all be reduced to one rule; but at present the cases varied considerably.

For the reasons above stated, he thought the Vice-Chancellor's judgment correct.

Cases cited for the demurrer.—Attorney-General v. *Goldsmith's Company*, 5 Sim. 670; *Dun* v. *Dun*, 2 Sim. 329; *Saxton* v. *Davis*, 18 Ves. 80; *The King of Spain* v. *Machardo*, 4 Russ. 225; *Salvidge* v. *Hyde*, 5 Mad. 138, 1 Jac. 151; *Ward* v. *Duke of Northumberland*, 2 Anst. 469; *Harrison* v. *Hogg*, 2 Ves. jun. 323; *Maud* v. *Acklom*, 2 Sim. 331; *Turner* v. *Robinson*, 1 Sim. & St. 313 & 6 Mad. 94; *Wild* v. *Bonham*, 2 S. & S. 91; *Mayor, &c. of London* v. *Levy*, 8 Ves. 403; *Shackell* v. *Macauley*, 2 Sim. & St. 79.

Cases cited for the bill.—Kensington v. *White*, 3 Price, 164; *Wilson* v. *Foljambe*, 2 Sim. & St. 165; *Knye* v. *Moore*, 1 Sim. & St. 61; *Attorney-General* v. *Merchant Tailors' Company*, 5 Sim. 288 & 1 M. & K. 189; *Duke of Beaufort* v. *Berty*, 1 P. W. 703.

Registrar—Mr. Hussey.

VICE-CHANCELLOR'S COURT.—Dec. 8, 1836.

Wallis *v.* Taylor.

Under a Limitation in a Will of Personalty to the separate Use of a married Woman, for Life, and, after her Death, to her Executors and Administrators; her Husband, as Administrator, entitled, and not her Executors.

A testatrix, by her will, directed as to a moiety of money in the 3 per cents, to be in trust to permit her daughter Sophia to receive the dividends thereof during the term of her natural life, for her

sole use and benefit, free and independent of the debts, &c., of her then present or any future husband; and from and after her decease, upon trust, to assign and transfer the moiety unto the executors or administrators of the daughter, to and for his, her, or their own use and benefit; the other moiety of stock was limited to the other daughter of the testatrix. The daughter Sophia was married at the date of the will, but her husband afterwards died, and she married again to the plaintiff, Captain Wallis, but afterwards lived separate from him. Mrs. Wallis afterwards died, having previously made her will, in which she recited the will of her mother, and that the stock consisted of £1100. She directed the trustees of her mother's will to transfer the stock to certain persons therein named, whom she appointed executors. These executors, however, did not prove the will.

The question was, whether Captain Wallis, as administrator of his wife, or the executors of the wife, were entitled.

Mr. Stuart, for the plaintiff, contended, that the case of *Sanders* v. *Frank* removed all doubt that Captain Wallis, as administrator, was entitled. Besides that, the executors had not taken out probate.

Mr. Turner, for the trustees, contended, that, according to the construction of the will, Mrs. Wallis took a life interest, with a power to point out the person who was to take after her death; and that she had a power to make the appointment whether the husband sanctioned it or not; and that they, as trustees, having notice of Mrs. Wallis's will, could not transfer the fund to her administrator; and, besides, that the words, executors and administrators, in some cases, had been held to mean the next of kin; might they not have a claim, and ought they not to have been brought before the Court?

Mr. Walker, for the executors, said, that they had delayed taking out probate until it had been decided by the Court whether they had a right to do so. *Primâ facie*, the executors and administrators were entitled; but that it was absurd to suppose that the husband would take, when the will of the first testatrix said that he should not take any benefit.

It appeared by the will that she was a married woman; that if the persons whom Mrs. Wallis had appointed executors were not to take, that the Court had always held the words, executors and administrators, to mean the next of kin.—*Bulwer* v. *Jay*, confirmed by Lord Brougham.

The Vice-Chancellor observed, that his decision in that case had been certainly confirmed, but in a very odd way, by Lord Brougham; that was, however, a case of settlement, not of a will.

Mr. Walker said, that there was another case also—*Palin* v. *Hills*. He also contended that it was quite clear the testatrix did not mean personal representatives; that it was to be for her separate

use, independent of her present or any future husband, clearly excluding the husband from any benefit.

The VICE-CHANCELLOR said, that the testatrix did not mean that the daughter should have a power of appointment; that you might provide that, after the death of parties who take for life, that the executors and administrators should take it. The testatrix did not mean that the daughter should have a power of appointment, because she confined the separate use for life only; and that, Mrs. Wallis having no such power, the plain meaning of the will was, that the executors or administrators should take it; therefore, that Captain Wallis would be entitled, as administrator; that the trustees, as fundholders, had done right in taking the opinion of the Court; that, therefore, they should have their costs; but that the executors, who had not proved, ought not to have been heard, and, consequently, not to have their costs.

Cases cited.—*Sanders* v. *Frank*, 2 Mad. 147; *Bulmer* v. *Jay*, 4 Sim. 48, confirmed on appeal, 3 M. & K. 197; *Palin* v. *Hills*, 1 M. & K. 470.

Registrar.—Mr. Fry.

DEC. 8, 1836.

BOTTOMLEY *v.* FISHER.

Construction of the Words of a Will as to whether Legacies lapsed, or the Executors or Administrators of the Legatees took by substitution.

A testatrix, by her will, dated the 6th of February, 1810, gave her personal estate to trustees, upon certain trusts, to transfer stock to different persons; amongst the rest to "transfer to the child of my late brother, Thomas Allen, who died in America, or the executors or administrators of such child, if there was but one living at his death, or the children equally of my said brother, if there was more than one child living at his decease, or born in due time after, or the executors and administrators of such children," £1200, in the 4 per cents., or the value thereof.

The testatrix died, and the will was proved, and all the legacies paid, except the £1200.

It appeared that the brother of the testatrix had died, in America, twenty years before the testatrix, and had left five children living at his decease, of whom four died in the lifetime of the testatrix, leaving one surviving her.

The plaintiffs were the personal representatives of three of those who died in the lifetime of the testatrix, and the defendants were the executors and the other legatees of the testatrix's will; and the question was, whether or not, according to the terms of the will, the personal representatives of the children who died in the lifetime of the testatrix took as personal representatives of the children by substitution.

The Solicitor-General and Mr. Wray, for the plaintiffs, con-

tended, that the rule, *primâ facie*, was, that a gift to a person, his executors, and administrators, lapsed by the death of the party. The case in Peere Williams, (*Elliot* v. *Davenport*, we presume,) however, decided that a will might be so specially penned as that the legacy should not lapse; and that, in this case, there would not be a lapse. That the testatrix was ignorant of the state of the family; and, being desirous of making a provision for all the branches of the family, it might have occurred to her that some of the children were dead, and therefore that the legacy should be divided, not only amongst the children of her brother, but to the personal representatives of those who were dead; and the testatrix contemplated the period of her brother's death, but not her own, as was usual in such cases. It was a condition precedent that the child should be living at the time of the brother's death; this was evident by the words, "children living at the time of my brother Thomas Allen's death.

Mr. Kenyon Parker, for the trustees, submitted to the opinion of the Court, and suggested that the question was, whether the words were to be read as words of limitation or of purchase?

The VICE-CHANCELLOR said, that it appeared to him that it was quite plain what the testatrix meant. She did not know whether her brother had any children or not; she meant, if there were children, that they would take; if there were no children, then that their representatives should take.

His Honour, therefore, decreed, that those children and the representatives of those children who were living at the death of her brother, were to take.

Cases cited.—*Elliott* v. *Davenport*, 1 P. W. 86; *Waite* v. *Templer*, 2 Sim. 524.

Registrar.—Mr. Fry.

MARCH 26, 1835.

CLAYTON *v.* PENNINGTON.

What Descendants entitled to a Bequest under the Word "Issue," and as to the period of vesting.

John Dixon, by his will, gave the residue of his personal estate and effects to trustees, in trust, for the benefit of his daughter, Elizabeth Goff, and his granddaughter, Ann Goff, and any children the said Elizabeth Goff might have by any future marriage; "and in case all my said grandchildren should happen to die, without leaving issue, before the bequests hereinbefore mentioned shall respectively become due, then I give and bequeath all my said surplus monies," (being the residue, after payment of his said granddaughter, Ann Goff, of a legacy of £1000, at her age of twenty-one years, and a similar legacy of £1000 at her age of twenty-three years,) "unto the children of my brother, Benjamin Dixon, and their lawful issue, in equal shares and proportions, or unto such of them as shall make and prove their right, to the satis-

faction of my said trustees, within two years next after the first notice thereof to be given in the London Gazette; and which notice I order and direct my said trustees to insert once in each month for the first six months next after failure of issue of my said daughter."

Ann Goff survived the testator, and died, leaving Elizabeth Goff her surviving, who died without having been married.

The testator's brother, Benjamin Dixon, had children, grandchildren, and great grandchildren.

The question was, at what period the bequest in favour of the testator's brother, Benjamin Dixon, and their lawful issue, was to be considered as having become a vested interest? and, consequently, who were the parties entitled to the trust-fund, and in what shares and proportions?

The VICE-CHANCELLOR decided, that, according to the true construction of the testator's will, the children of the testator's brother, Benjamin Dixon, and the lawful issue, in every degree, of each child of the said B. Dixon, (whether such child had survived the testator or not,) who should be living at the time of the death of the said Elizabeth Goff, were to take the clear residue of the said testator's personal estate, *per capita*, in the event of the said Ann Goff, and any grandchildren or grandchild of the said testator who might have been born after the date of his said will, having died in the lifetime of the said Elizabeth Goff, without leaving issue.

Counsel.—Mr. Knight, for the plaintiff; and Mr. Turner, Mr. Teed, and Mr. Haytor, for the several defendants.

Solicitors.—Messrs. Pocock, for the plaintiffs; and Messrs. Bridges and Mason, and Mr. W. T. Clarke, for the defendants.

LORD CHANCELLOR'S COURT.—DEC. 2, 1836.

DAVENPORT *v.* WHITMORE.

Demurrer to a Bill for an Account of Profits of Ship and Freight. Query, Whether the Demurrer is not bad in respect of the Contract as to Freight, though under the Ship Registry Acts, the Contract as to the Ship is void.

This was an appeal from a decision of the Master of the Rolls, who allowed a general demurrer to the plaintiff's bill.

The bill had been filed for an account of the profits derived from a vessel, in respect of which, and the freight, a contract had been entered into between the plaintiff and the defendants.

The bill also asked for an injunction to restrain the defendants from proceeding in an action at law to recover £500 on a bill accepted by the plaintiff, which was a part of the transaction.

To this a general demurrer for want of equity had been filed,

because it was alleged that the contract, by which the plaintiff claimed, was at variance with the Ship Registry Act.

The question was, whether, as the demurrer was to the whole bill, it was not bad; because, in respect of the freight, it was contended that there was an equitable right in the plaintiff, though the rest of the contract might have been bad?

Sir William Horne and Mr. Rogers, for the plaintiff, contended that, according to the case of *Mestaer* v. *Gillespie* and *Exparte the ship Warre*, an account for freight might be maintained, although the contract in respect of the ship was invalid.

Mr. Wigram and Mr. Richards, for the defendants, contended that the contract could not be separated from the freight, and that if the demurrer was good as to the contract, it must be good as to the freight; that in the case of *Meslaer* v. *Gillespie* it was a separate contract for freight.

DEC. 15.

The LORD CHANCELLOR said it was unnecessary for him to enter into the question raised on the Ship Registry Act, for as the defendants had admitted that they had kept accounts of freight, it would not be just to allow them to avail themselves of any plea for refusing an account of that freight, while at the same time they claimed a right to sue the plaintiff at law. His Lordship was of opinion that the defendants were bound to answer and put the plaintiff in possession of the state of the accounts, which they admitted to have been regularly kept, of the produce of the freight. The appeal therefore must be allowed and the demurrer overruled.

Cases cited by the plaintiff:—Meslaer v. *Gillespie*, 11 Ves. 621; *Exparte the Ship Warre*, 8 Price, 269.

JAN. 19, 1837.

ESDAILE *v.* KYNASTON.

This case, which was decided by the Master of the Rolls, noticed ante, p. 52, has been appealed against to the Lord Chancellor, who has confirmed the decision of the Master of the Rolls, on the ground of multifariousness, and did not take into consideration the other grounds of the demurrer; but dismissed the appeal, with costs.

NOV. 21, 1836.

COOKSON *v.* HANCOCK.

The decision of the Master of the Rolls in this case, noticed ante, p. 72, has also been appealed against. The Lord Chancellor, however, confirmed the decision of the Master of the Rolls.

VICE-CHANCELLOR'S COURT.—Jan. 21, 1837.

Skinners' Company *v.* Irish Society.

Fees of Counsel—Number of Counsel—Charge for Observations—As to the Form of hearing Objections to the Master's Report on Bill of Costs.

In this case a bill had been filed by the Skinner's Company against the Irish Society, for the purpose of participating in considerable funds belonging to the society, and the bill prayed an injunction and receiver. A motion was afterwards made for an injunction and a receiver, and the intention of the parties, (according to the judgment of the Lord Chancellor,) was for the purpose of determining the question at once; this object, however, the Lord Chancellor would not comply with, but dismissed the motion with costs. There were forty companies interested; amongst the rest the City of London, all of which appeared by one counsel, except the City of London, which appeared by two counsel.

The City of London was not served with notice of motion.

The Lord Chancellor allowed the costs, but would only allow the order to be drawn up as made upon reading the answer and the affidavits verifying the documents mentioned in the answer, and not upon reading the documents themselves; consequently the parties would not be entitled to the costs of copies of documents. These documents had been referred to by Sir William Follett, (who appeared for the Skinners' Company,) and of which the City of London claimed copies.

The bill of costs of the City of London charged for two counsel, the senior 150 guineas, and the junior 80 guineas, instead of 120 guineas and 50 guineas, which were alleged to be the proper fees. £50 was also charged for observations to counsel.

This bill of costs the Skinners' Company objected to.

But the Master, having taken the opinion of Lord Henley on the subject, (having had doubts in his own mind,) allowed the charges.

To this report the Skinners' Company objected.

The question coming on to be argued last December, a preliminary question was raised as to the proper form of hearing the objections by the Court; whether it might be done by application for leave to file exceptions, or must be on the hearing of the exceptions?

After some observations by the Vice-Chancellor and counsel, in which *Exparte Anthony*, *Chennell* v. *Martin*, and *Fenton* v. *Crickett* were cited, the Vice-Chancellor postponed his decision until he had looked into the case of *Solomon Fells* in the Register's Book.

Jan. 21.

All parties now agreed to waive the objection, and to have the question heard on petition instead of exceptions. The facts of the

petition were supported by the affidavits of Mr. Kensit and of Francis George, clerk to the solicitors for the Irish society.

Mr. Wigram and Mr. Lloyd, for the Skinners' Company, contended, that the City of London had no more interest in the question than the other companies, who were satisfied with one counsel; that the reason of the Master as to the "importance of the case" could not hold, because every case was of equal importance to clients, whether rich or poor.

That the observations at the end of the briefs contained copies of the exhibits; so that, in fact, the City of London had obtained indirectly, what they could not otherwise have obtained; that if they wanted copies for their own convenience, they must pay for them; that if the plaintiffs had refused to lend the copies of the documents, then it might have been a question for the Court to decide, whether they should not be allowed the expenses of copies.

That the Master at first doubted as to the propriety of admitting £50 for observations, and said they must take it on their own risk; that the fees, looking to the length of the briefs, at 5s. a brief-sheet for the senior counsel, and 3s. 4d. for the junior, were too large, if the observations were included.

That the Master's reason for allowing two counsel was, that it was intended to dispose of the merits of the case on motion.

That the reason of the Lord Chancellor for not allowing copies of documents was, that the documents must be taken as part of the answer; and, in fact, they were supposed to be in court. That the Master admitted the principle to be, that they were not entitled to copies of exhibits, but might be as observations.

Sir Charles Wetherell and Mr. Randell, for the City of London, contended, that the question decided before the Lord Chancellor was one of great importance, and greatly affected the rights of the City of London, who exercised visitorial rights over the Irish society, and that they were, in fact, trustees, governors, and visitors, which right they would have lost had the motion succeeded, as it would have had the effect of abolishing the charter of the Irish society.

That the papers relating to the transaction were most voluminous, and had taken up upwards of a week in arguing; that they had to go through the history of the Irish society, which included two centuries; that the whole time taken up in preparation and attendance in the court must have been at least twelve days; and that, according to the allowance which the legislature had made for revising barristers, it would have been much less per diem than those learned gentlemen were allowed. That the question was one of great importance, and affected the whole province of Ulster.

Vice-Chancellor.—The Lord Chancellor said it was a case of great importance.

Mr. Knight was about to argue for the Irish society when the

Vice-Chancellor said he might do as he liked, but, had it not been for the great importance of the question, he would not have allowed it to be argued at all.

The VICE-CHANCELLOR, in giving judgment, said, that he relied on the report given in 1 Myl. and Craig, 162, and not on the report which had been published by the parties. That if the Lord Chancellor thought fit to give the City of London its costs, he must have thought that they had a right to appear by two counsel. That this case was of importance, appeared by there being twenty-eight counsel engaged, and by the case having lasted six days, and several fractions of days, beginning in November and continuing on for several days in January and February following. That the Master, having considered the bill of costs, arrived at his conclusion, but not, however, without having had some doubts on the subject, and not before he had consulted Lord Henley: and, certainly, if he had any doubts, he had a right to consult another person of more experience on those subjects, and a person of greater experience, and more profound knowledge of the law, his Honour was not acquainted with. It appeared to his Honour, that the question, as he collected from the Lord Chancellor, was a question of very great importance, and was a question which could not very well be decided without looking through a vast and chaotic mass of documents respecting transactions which extended through the space of two centuries; and, if the matter was to be properly brought before the view of counsel, and for them to do justice to their clients, they could not well do so without having not only what was material in the bill and answer, but also the observations made by the solicitors, who were of course more conversant with the subject in question than the counsel could at first possibly be.

That the case was of great importance was shewn by the conduct of the plaintiffs themselves; for they were not content with the ordinary talent exhibited by the rank and file of this court, (and he must observe that it possessed no ordinary talent, and was surpassed in talent by no other bar,) but they must bring the talent of another bar; they must, therefore, have thought the case important, and to meet this there must have been a great extension of mind; it might have lasted much longer, or it might have terminated sooner, and it appeared to him that the Master was at liberty, in seeing whether the fee was proper, not only to look at the quantity of brief sheets, but to consider the nature of the transaction, and the length of time likely to be taken up in the discussion. It appeared to him that, even if the Master had computed without the observations, the amount of fees would have been very little reduced, and that, in his Honour's opinion, they had not been overpaid; and the petition must be dismissed with costs.

Cases cited—Exparte Anthony, 2 G. & J. 55; *Chennell* v. *Martin*, 4 Sim. 340; *Fenton* v. *Crickett*, 3 Med. 496.

Dec. 7 & 8, 1836.

SPACKMAN *v.* TIMBRELL.

A Trader dying indebted by Specialty and simple Contract, having devised his Estates to his Heir, and the Devisee having settled those Estates on his Marriage, the Creditors cannot follow the Estates, but the Devisee is personally liable for the Value of the Estates settled.

Thomas Timbrell, by his will, dated the 14th Feb. 1820, gave and devised certain freehold and leasehold estates, (therein particularly described,) unto his son, Thomas Timbrell the elder, absolutely charged with the payment of £3000 to each of his daughters, Eliza Diana, afterwards the wife of Edmund Zachariah Jefferys Lewis (since deceased); Augusta Sophia, the wife of the plaintiff, Charles Spackman the elder; and Caroline Matilda, the wife of the defendant, the Rev. Geo. Crabbe; to be paid to them in four years after his decease, with interest half yearly, by his said son Thomas Timbrell the elder, and with the further sum of £2000, upon certain trusts therein mentioned, which had since determined or been incapable of taking effect; and, subject thereto, the testator gave the £2000 unto his three daughters, share and share alike. The testator then made several devises and bequests to his sons and daughters, and as to all the residue of his real and personal estate, he gave, demised, and bequeathed the same unto his said son Thomas Timbrell and Charles Spackman the elder, upon trust, to sell; and, after paying all his debts, legacies, and expenses, he gave the monies to arise by such sale, unto his five children, equally, share and share alike. He appointed his son, Thomas Timbrell, and the plaintiff Charles Spackman the elder, executors.

The testator died, leaving the defendant Thomas Timbrell his eldest son and heir at law, and the other four children named in his will, surviving, and the will was proved by the executors.

That Thomas Timbrell the elder had since sold off divers of the said testator's residuary estates, and out of the purchase-monies paid divers of the testator's debts, but that the testator, at the time of his death, was indebted to the plaintiff Charles Spackman the elder in £900, and to various other persons to a considerable amount, and that Thomas Timbrell had paid Charles Spackman the elder £150.

That by indentures bearing date the 8th and 9th days of January, 1823, executed on the marriage of Thomas Timbrell the elder with the petitioner Louisa Webber, the several hereditaments comprised in the testator's will and devised to Thomas Timbrell the elder, together with other hereditaments, were conveyed to the use of William Stump and William Strong, for 1000 years, and, subject thereto, to the use of Thomas Timbrell and Louisa Timbrell, for their respective lives, and afterwards for

the benefit of the children as tenants in common. The term of 1000 years was for the purpose of raising the three several sums of £3000, bequeathed by the will of Thomas Timbrell the testator, to the three daughters, with interest at £5 per cent. There was also a covenant on the part of the intended wife's father, to settle a sum of money. There were five children of the marriage, the petitioners after named, all infants.

Before the testator's death, his daughter, Caroline Matilda, married with the Rev. George Crabbe, and, by the marriage-settlement, dated the 8th of April, 1817, the testator covenanted with John Crabbe and Thomas Timbrell the elder, (the trustees,) within twelve months after his decease, to pay to them £4000, upon certain trusts therein mentioned, for the benefit of the husband and wife and the children, and to pay interest at £5 per cent. in the mean time.

There was issue of the marriage six children—Caroline, George, Thomas, Catherine, Sophia, and John, all infants.

On the marriage of James Selfe Timbrell and Ann Burnett, indentures of settlement were made, dated the 30th and 31st days of May, 1820, whereby the hereditaments devised to him were settled in favour of the husband and wife and children. James Selfe Timbrell afterwards died without issue, having made his will, dated the 28th of September, 1825, whereby he appointed the defendant, Thomas Timbrell the elder, and his said wife Ann Hyatt, then Ann Timbrell, to be executor and executrix thereof, the latter of whom alone proved the will. She afterwards married Robert Hyatt.

That the testator, in his lifetime, was a banker and within the bankrupt laws.

Two suits had been instituted to administer the testator's estates, and for a sale and payment of his debts and legacies.

Thomas Timbrell the elder died on the 20th of July, 1835, leaving the petitioners, Louisa Timbrell his widow, and Louisa Eugenia, Emily Georgiana, Thomas, Rosa Mary, and Sarah Augusta, his only children him surviving.

This was a petition of rehearing, whereby it was sought to reverse so much of a decree of the Vice-Chancellor made in this cause, and therein specified, amongst which he ordered it to be referred to the Master to appoint a receiver of so much of the specifically devised real estates, (except copyholds,) of which a receiver had been appointed, and insomuch as the decree affected the hereditaments specifically devised of the testator, comprised in the settlements of the 8th and 9th days of January, 1823, under which the petitioners claimed to be purchasers for valuable consideration, and entitled, under the settlement, in preference to such of the creditors of the said testator, who had not a specific charge on such estates prior to the settlement.

Mr. Wigram, for the appellants, said the question was, whether

an heir or devisee of a trader taking estates by descent, and marrying and settling the estates, such settlement took the estates out of the reach of the creditors? The general rule of law was, that the property was not liable, but the heir was personally liable; and the statute of 3 W. & M. c. 14, was so framed as to give the creditors the same remedies as before, for the 5th section excepts *bonâ fide* alienations, which meant not only for value, but also in consideration of marriage.

So if the heir of a trader took estates by descent, and he aliened before the writ was signed, the creditors could not follow the land; consequently, there was no charge on the land, but only a personal liability, enlarged by the statute of 47 Geo. 3, c. 74.—*Horn* v. *Horn* and *Lechmere* v. *Brasier*.

The VICE-CHANCELLOR inquired whether, supposing before the passing of Sir Samuel Romilly's act, an heir at law, on whom real estates descended, had not *bonâ fide* aliened, and the creditor took out execution against the lands not *bonâ fide* aliened, could the creditors have followed them? There was no question if they had been *bonâ fide* aliened.

Mr. Wigram said, if there had been a case of fraud, the creditors could have followed, but here there was no fraud. *George* v. *Milbanke* decided that if a party took without consideration, and that party alienated for valuable consideration, it would be good; it was not the payment to the heir at law which made it good. That putting out of the case fraud, it was nothing more than the devisee exercising his legal right, and it was the same in equity as at law; so if the transaction would be good if money passed, what difference would there be if it was marriage? Lord Eldon, in *George* v. *Milbanke*, said that marriage was as good a consideration as money.

If there is fraud, can the wife be implicated in the fraud even if the husband committed it? That notice of the will was not notice of the debts, and that there was money consideration on the part of the lady's father.

Mr. Morley with Mr. Wigram contended, that according to the cases of *Mathews* v. *Jones* and *Kynaston* v. *Clark*, the heir and devisee were personally liable and not the lands; that the statute 3 & 4 W. & M., c. 14, mentioned *bonâ fide* alienations; that this settlement would come under those words, for no fraud could be imputed; that at common law the heir was liable to pay his ancestors' specialty debts, but the creditors could not follow the lands when they were aliened.

That this Court followed the same rule, but if the heir aliened with fraud, the lands would be liable in the hands of the alienee, but this fraud must be concocted between the alienor and the alienee, and not be by the alienor only, for it would be a monstrous thing if one party could defeat a *bonâ fide* purchase.

That the creditors might lie by and take interest from the heir

or devisee, and afterwards come upon the estate of the widow and children.

That the statute made the heir liable, although he alienated the estate; but the statute gave no remedy against the estate; it provided, specially, that the heir should be liable, but it did not follow the lands in the hands of the alienee.

That the Statute of Frauds, 29 Car. 2. c. 3, s. 11, charged equitable estates, in the hands of the alienee, when alienated after the writ was issued, making a distinction between that case and a prior alienation, shewing that the creditors were not to lie by; and that statute first gave other remedies at law against equitable estates.

The 47 Geo. 3, c. 74, merely gave remedies to simple contract creditors, but it gave no new remedies as against the heir or the lands, but only placed the simple contract creditors in equity, on the same footing as the specialty creditors.

That the marriage consideration was as good as money; that, accordingly, by the bankrupt laws, the marriage consideration was good against the claims of the creditors, if there was no previous act of bankruptcy.

That the marriage consideration was equally good within the meaning of the 3 & 4 W. & M., c. 14, as a pecuniary consideration; the same words were used there as in the Statute of Fraudulent Conveyances that the cases of *Brown* v. *Carter*, *Kirk* v. *Clark*, and *Partridge* v. *Gopp*, were authorities as to the marriage consideration, being as good as money. That if this decree remained, it would not only affect persons situated as these persons were, but as the law was now general and not confined to traders, it would affect all settlements, where estates were taken by descent or devise, and consequently be a bar to marriage.

Mr. Morley having cited the case *Kennett* v. *Johnson*, the Vice-Chancellor said it appeared to him that the decision was in direct opposition to the decree.

Sir William Horne and Mr. Richards, for the creditors, contended that the settlement was a fraud by the son to cheat his father's creditors. That the law considered the heir at law as the person against whom judgment might be taken out, and the estate taken in execution.

That, at law, although the devisee alienated before judgment and execution, yet the plaintiff might execute the judgment on the land of the alienee; and the statute acknowledged the right to take out execution on the land.

It appeared that the legislature wanted to lay down some restrictions, but, dealing with the subject generally, and looking at the title of the plaintiff-creditor, and his just right to be paid out of the lands, it went on to state the execution he was to have. The 5th section was important as to the intention of the legislature; it recited what it considered as a gross fraud. Here the object of the

legislature was to guard against the consequences of creditors being cheated of their debts by those in the character of heirs and devisees, before any proceedings were brought against them by creditors.

It was quite clear that execution might be taken out against all lands alienated, but there was a saving of right in the act to take out execution against lands of the ancestor *bonâ fide* alienated.

If the devisee happened to have the legal administration, why should not the creditors have power also to pursue the lands in the hands of any person in whom they might be found, except *bonâ fide* alienees?

The meaning of *bonâ fide* alienations was value without fraud, and without notice of creditors; but, if the consideration of the parties be ever so good, yet, if those who enter into a contract in respect of those lands have notice of the equity, this Court could relieve.

That the creditors had a right to be paid out of the estates to be administered, without regard to the persons administering. If you brought such a bill against the heir or devisee, and he had sold the estate, would it be good? It was quite clear he had a right to sell for payment of debts.

Fraud had not been imputed, for this reason, because the party selling was the party whose duty it was to sell.

The marriage settlement is good, *ultra* the debts.

That all the cases which had been cited were cases of sales and mortgage; but, in this case, the husband does not mortgage or sell; he makes the property the subject of a marriage settlement. That the money consideration was to be paid at an after time, and was to be settled; consequently, could not be applied for the testator's debts.

The creditors could prove notice by the parties, because the settlement described the property in the same manner as it was described in the will, and by the settlement being made the basis of the will, and dealing with the sum of £3000 mentioned in the will.

There was no question as to the wife's having notice, for she was an adult; they also knew that he was a trader, and was indebted.

Mr. Knight and Mr. Wilcock for the legatees.

Mr. Jacob appeared for the Crabb family, and argued against the creditors' following the estate, and contended, that there could not be a difference between the simple contract and the specialty debts, under the act. *Lechmere* v. *Brazier*.

The Vice-Chancellor said, that Sir Samuel Romilly's act did not give simple contract creditors of a party, trader at the time of his death, any other authority than coming on the estates in equity, and not at law; it could not be said that that act had placed them on the same footing.

Mr. Jacob cited *Millar* v. *Horton*, *Gott* v. *Atkinson*, *Shiphard* v. *Lutwidge*, and he contended that the legatees stood in a better

position than the creditors, because they had a charge under the will, and that there was no question that the testator could give the legatees priority.

The VICE-CHANCELLOR said, that there was no doubt that a man might make his will, which to a certain extent might defeat his creditors.

Mr. Reynolds with Mr. Jacob contended, that there was an express devise for payment of the portions, and this gave them a priority over the creditors, and cited *Shiphard* v. *Lutwidge*, *Bailey* v. *Ekins*, which decided that a charge took it out of the statute, and that the case of *Millar* v. *Horton* had decided that a devise of only one debt would take it out of the statute.

The question, however, as to the priority of the legatees, was agreed should be postponed.

Mr. Wilbraham appeared for the defendant Mrs. Hyatt, and Mr. Stinton for a trustee of Mrs. Hyatt.

Mr. Simon appeared for other parties.

JAN. 10, 1837.

The VICE-CHANCELLOR, in giving judgment, said the case of *Spackman* v. *Timbrell*, was a case of this nature. Timbrell the testator by his will devised certain tenements to his eldest son in fee, and charged them with the payment of certain legacies, and devised to his other sons, and to each of his three daughters, lands also in fee; and, after his death his eldest son, (in 1823,) married, and made a settlement on that marriage, not only of the lands devised to him by his father, but of other lands of his own; and it appeared that there was not only the consideration of marriage, but also a pecuniary consideration, in the shape of a covenant in the settlement, on the side of the lady's father, to pay a certain sum to be settled in favour of the wife and the issue of the marriage.

The settlement was so framed, in the first instance, as to create a trust, by means of a term on both estates, for raising the legacies which had been charged in the father's will.

The bill was filed by the persons who claimed under the covenants which had been made. It was filed for the purpose of administering the estate of the testator; and the persons claimed under covenants made by the testator on the marriage of his daughter with Mr. Crabb.

It appears, about the time this bill was filed, another creditor's bill was also filed; and, on hearing of this cause, a decree was made without evidence, and quite in the common form, which was by the consent of the plaintiff in the other creditor's suit. It directed, that the bill in that suit should be dismissed, and the costs paid; and, by that decree, a receiver was appointed of the personal estate. Well, there were, from time to time, proceedings taken in this cause; and, after the Master had made his general report, the cause came on to be heard on further directions in 1834, and I

believe the decree then taken was previously adjusted by counsel, and I apprehend the point in question was either not considered, or not thought material, what steps should be taken, it being supposed that the assets were sufficient without the sale of the real estates; however, for some reason, the decree was so construed as to direct the sale of that portion of the real estates devised by the testator to the eldest son, and settled by him in the manner above mentioned.

A petition of rehearing was presented, praying that the decree, so far as it directs it to be sold, and so far as it gives some other directions which it is not necessary to specify, might be reversed, and that effect might be given to the settlement in favour of the wife and children; there was no question as to the life interest of the settlor, because he had died; so that the case comes to this, that a person has devised his real estates, and was indebted by specialty, and was a trader at the time of his death, and after his death the devisee has parted with the real estates for that species of valuable consideration which marriage unquestionably is; the question then is, whether that estate can be followed? Now I am of opinion, that it cannot. It appears to me, that the law is clearly and correctly laid down by Lord Chief Baron Macdonald, in giving judgment in the case of *Mathews* v. *Jones*, 2 Anst. 506, and that it was not a hasty judgment, because after an opinion had been expressed to a certain extent, it was thought right that time should be taken to consider; and the judgment of the Chief Baron conveyed the opinion of the whole court; he says, "It has been attempted to raise another question upon the construction of the statute of Wm. & Mary, to show that, as against creditors, a devise is wholly void, and therefore different from the case of lands descended; it is clear that no such distinction exists. Before that statute, the only remedy of a creditor was against the heir, to the amount of the assets descended. A devise effectually defeated his claim; the statute therefore extends the remedy against the devisee; but in this case, as well as in that of the heir, it is clearly the intent that the land should not be charged in the hands of a purchaser, and accordingly, in both cases, the heir and devisee continue personally answerable for the debt, after they have parted with the estate in respect of which they become chargeable."

It appears to me, looking at a great number of cases, that it is quite certain that the statutes of 3 & 4 Wm. & Mary, c. 14, and the 47th Geo. 3, c. 74, sec. 2. do not charge the real estates descended or devised, with the payment of debts of the ancestor, but they make the heir or devisee personally liable to answer for the value of the assets; and the point was laid down in 2 Ves. and in 8 Ves. (we were not able to hear the names of the cases) which established that point, and it was impossible to say, that a conveyance in consideration of marriage, for the benefit of the wife and children, does not make them purchasers for a valuable consider-

ation, of all the interest conveyed to them, but by the conveyance, the heir becomes personally liable to the creditors for the value of the lands conveyed.

In *Butcher* v. *Nightingale*, 1 Str. 665, it was held, that if the heir who had taken assets by descent, pleads in an action of debt, that he has paid specialty debts, to the value of the assets descended, the plea is good on demurrer. And the decision in *Horn* v. *Horn*, in 2 Sim. & St. 448, must have proceeded on that ground. It is clearly settled, that a charge for the payment of debts, takes the case out of the statute of the 3 & 4 of Wm. & Mary, and makes equitable assets. The decree must therefore be reversed His Honour said he could not decide the case sooner, as he wished to be satisfied by looking through the decrees and the settlements, to see whether any part of them affected the point of law, but there was nothing which affected it.

The VICE-CHANCELLOR said, "I desired to be furnished with the pleadings in *Johnson* v. *Kennett*, which is reported. It is quite plain, the decree in that case was perfectly wrong. It was quite nonsense to take a decree for the payment of debts, and at the same time to keep before the court those persons who had purchased the real estate from the heir of the devisee; but I remember perfectly well, when the two points were argued before me at the bar, that all that I meant to decide was this, that in a case where it might be made a question where it was not admitted debts remained to be paid, but only questionable, why the conduct of the purchasers and of the parties might be very good evidence to show that the debts were paid; then the consequence would follow, that they would be liable to see to their purchase-money, which was applicable to the payment of the legacies, but the moment it was stated to me, that there were debts, it appeared to me that I had only been hearing an hypothetical case."

Cases cited.—George v. *Milbanke*, 9 Ves. 190; *Johnson* v. *Kennett*, 2 Sug. V. & P. 39, and 6 Sim. 304; *Lechmere* v. *Brazier*, 2 Jac. & Walk. 287; *Horn* v. *Horn*, 2 Sim. & St. 448; *Millar* v. *Horton*, Cooper, 45; *Gott* v. *Atkinson*; *Shiphard* v. *Lutwidge*, 8 Ves. 26; *Bailey* v. *Ekins*, 7 Ves. 319; *Matheus* v. *Jones*, 2 Anst. 506; *Kinaston* v. *Clark*, 2 Atk. 204; *Brown* v. *Carter*, 5 Ves. 862; *Kirk* v. *Clark*, Prec. C. 275; *Partridge* v. *Gopp*, Amb. 596.

FEB. 2, 1837.

In re NEWTON.

A Prisoner not entitled, to be released in consequence of his having been arrested while attending a Consultation with his Counsel, for the Purpose of engaging in Legal and Equitable Proceedings.

In this case, Mr. Newton, a gentleman residing in the country, had come up to town concerning proceedings which had been

instituted in this court, and in the Court of Exchequer. Mr. Newton had been arrested whilst returning from a consultation with his counsel, concerning a petition which he was about to present to the court, to obtain a distribution of property, which he claimed to derive from his grandfather. He was not actually engaged in the proceedings, the intended petition was the first step in which he was concerned.

Mr. Knight contended, that according to the principles of the court, the interference might take place as well where the personal attendance was required for the purpose of instituting the proceedings, as when the proceedings had actually commenced; and that wherever the personal attendance of a party was required in prosecuting his suit, that he should be exempted from arrest, and cited *Franklin* v. *Colquhoun*, 1 Mad. 580; *Childerstone* v. *Barrett*, 11 East, 439; *Bromley* v. *Holland*, 5 Ves. 2; *Allsbury* v. *Troughton*, 1 Ch. Rep. 92; and *Meynel* v. *Sterling*, 1 Ch. Rep. 217.

The VICE-CHANCELLOR, however, thought that the cases cited would not justify him in discharging the prisoner.

LORD CHANCELLOR'S COURT.

Since the above was printed, an appeal has been made, in this case, by Mr. Newton in person.

Mr. Newton stated that he was returning from his counsel, and was upon the point of entering Lincoln's Inn Hall, for the purpose of dining there, as a student, when he was arrested. He urged that his being in that place during the presence of the judges, would exempt him from arrest; and cited, during his argument, several cases in addition to those already mentioned. His Lordship, however, agreed with the Vice-Chancellor, in thinking there was nothing in the cases that would warrant him in discharging the plaintiff. He therefore discharged the appeal with costs.

MAY 31, JUNE 1, 1836; JAN. 18, 1837.

EWING *v.* OSBALDESTONE.

Demurrer allowed to a Bill filed for the Purpose of enforcing a Partnership Contract, in respect of the Surrey Theatre, which was not duly licensed.

The plaintiff and defendant in this case had entered into partnership, for the purpose of carrying on theatrical performances at the Surrey Theatre. The agreement for partnership was contained in a correspondence which took place between the parties whilst the plaintiff was residing in Scotland. On the faith of this agreement the plaintiff transmitted several sums of money to

the defendant, who superintended and carried on the performances of the theatre. For some time the defendant treated the plaintiff as a partner. The plaintiff afterwards came to London, and the defendant soon afterwards, (that is to say) on the 1st of March, 1832, procured an assignment of the lease of the theatre, the plaintiff having previously, that is, on the 7th and 8th of Feb. 1332, given orders on Coutts and Co. for payment of some money, which it was alleged was the consideration money for the assignment.

Other letters afterwards passed between the parties, in one of which, dated the 19th of Dec. 1832, the plaintiff referred to "poor Chapman's case," reported in the Times newspaper (meaning the case of *Parsons* v. *Chapman*,) and wished to know what the defendant thought of it.

The defendant subsequently refused to recognise the plaintiff as partner, alleging that the plaintiff, finding that the theatre did not at first answer his expectations, had refused to advance any more funds, but that afterwards the defendant, by his own exertions, having made the theatre more prosperous, the plaintiff then claimed a share in the profits. This the defendant would not consent to, but offered to return the money which had been advanced; and, indeed, even in court, before this appeal was heard, the offer was again repeated, but the plaintiff refused. On the 19th of July, 1833, he filed his bill against the defendant, for the purpose of having the agreement carried into execution. To this bill the defendant put in a demurrer, on the grounds that the contract was for an illegal purpose. On the question being argued before his Honour the Vice-Chancellor, he allowed the demurrer, and dismissed the bill with costs. From this decision the plaintiff appealed.

MAY 27, 1836.

Sir Wm. Horne and Mr. Stuart, for the plaintiff, contended that the plaintiff entered into the partnership without the intention of doing anything illegal; that at least part of the money had been advanced and applied in payment of the lease; and that so far as the lease, furniture, decorations, &c. went, there could be nothing illegal in his advancing money for their purchase. In order to make the cases apply, there must be distinctly shown an illegal intention, when the contract was entered into. Nothing could be gathered in this correspondence that any thing illegal was intended on the part of the plaintiff, but, on the contrary, that he only intended employing honourable means for increasing his income. That even admitting some part of the contract to be illegal, yet as other parts of it were clearly legal, the Vice-Chancellor ought not to have dismissed the bill with costs. That as the defendant managed the performances, he had committed the illegal act himself; it would be unjust, therefore, to make the other party suffer. Suppose a case of partners in a ship; if the managing partner dealt in

contraband goods, he might get the whole property into his own hands. Thus, the plaintiff residing at Edinburgh, trusted the defendant with his money and the management of the theatre, and the defendant had taken advantage of his own illegal act, to deprive the plaintiff of his rights. The case of *Knowles* v. *Houghton*, had decided, that if some part of the contract was illegal, yet what was legal might be enforced; and the case of *Dover* v. *Opey* had decided on the part of the defendant, that if the dealing had been unfair, he could not take advantage of his illegal act. That in the case of *Watts* v. *Brook*, an illegal contract was acted on by the court. Here there was no evidence of illegality on the part of the plaintiff, as in the cases of *King* v. *Handy*, *Gallini* v. *Laboret*, *Parsons* v. *Chapman*, *King* v. *Neville*, *De Begnis* v. *Armistead*. Those cases had decided that where both parties knew that the purposes were illegal, there could be no doubt that the contract could not be enforced. Was it because this was a theatre, that it was to be taken for granted that the performances must be illegal, or that something illegal was intended? In *Rodwell* v. *Ridge*, the circumstance of the performances being carried on, was held sufficient *primâ facie* evidence of the theatre being duly licensed.

Mr. Knight, Mr. Beames, and Mr. Carpenter, for the defendant, contended, that according to the plain meaning of the words used in the letters "theatrical performances," they must mean the performances prohibited by 10 Geo. 2. c. 28. Much had been said about the knowledge of the parties. Mr. Knight could not conceive what that had to do with the matter, for all were supposed to know the law. That as this theatre was not situated in Westminster, where the King resided, it could not be licensed by the Lord Chamberlain, but could only be licensed by the magistrates for music and dancing. That the agreement between these parties, was for the purpose of theatrical performances of the stage. That the plaintiff entered into and acted on the agreement with the full knowledge of *Chapman's* case, which he referred to in one of his letters; in fact, the cases of *De Begnis* v. *Armistead*, *the King* v. *Glossop*, *the King* v. *Neville*, *Ottley* v. *Browne*, established that a contract circumstanced as this was, was an illegal contract, and that if it was so, the court would not direct any account, of the partnership; and that the case of *Dover* v. *Opey*, reported in the 2nd vol. of Eq. Ca. Abr., cited to on the other side, could not be considered an authority. The 2nd vol. was collected by a person not known—but that the first volume was always considered an authority.

JAN. 18, 1837.

The LORD-CHANCELLOR, in giving judgment, went through the case, reading all the letters which passed between the parties, together with the evidence; and observed that, from the correspondence and the evidence, it was clear that the plaintiff knew

of the nature of the performances before he entered into the contract, and knew that they were contrary to law.

The law was laid down in the 10 Geo. 2. c. 28; 25 Geo. 2. c. 36; 28 Geo. 2. c. 30; and 5 Geo. 4. c. 83. His Lordship then read the 2 & 6 sec. of 10 Geo. 2. c. 28. The 1st sec. which declared that "any person who should represent any interlude, &c. and such person should not have any legal settlement, and without letters patent, or the Lord Chamberlain's license, should be deemed a rogue and vagabond." The 2 & 6 sec. described the penalties. By 25 Geo. 2. c. 36, sec. 2. the magistrates were empowered to license any house for public dancing, music, or other public entertainments of the like kind.

The 28 Geo. 3. c. 30. empowers justices to license for the performance of tragedies, &c., beyond certain limits of London, and other places.

The 5 Geo. 4. c. 83. repealed the provisions respecting rogues and vagabonds; but did not repeal the 5 sec. of 10 Geo. 2. c. 28. which says, "no person should represent any interlude, &c. in any part of Great Britain, except in the city of Westminster, and in such places wherein his Majesty should in person reside, during such residence only."

The only license, therefore, which the Surrey Theatre could have, would be the Magistrate's license, which did not authorise any representations described in 10 Geo. 2. This construction was put on the statute in the cases of *The King* v. *Glossop*, *The King* v. *Neville*, and *De Begnis* v. *Armistead*.

But it was argued, that the theatre might have been used for lawful purposes; if it had it would have been confined to music and dancing. But of this the contract was silent, and the bill did not allege that the intention was to apply it to those purposes.—The question was, whether the contract between the parties was not to use the theatre for illegal purposes.

If the contract was of that description, to support it would be contrary to the principles of this court, and all the decided cases.

In *Langton* v. *Hughes*, 1 M. & S. 596. Lord Ellenborough said it might be taken as a received rule of law, that what was done in contravention of the provisions of an act of parliament, could not be the subject matter of an action. In *Gallini* v. *Laboret*, it was held that no action could be maintained where there was no license by the Lord Chamberlain. Several other cases had decided to the same purport; such as *Mitchell* v. *Cockburne*, *Knowles* v. *Houghton*; and in *Thomson* v. *Thomson*, the same principles were laid down by Sir Wm. Grant, who dismissed a bill which had been filed to enforce an illegal contract. In *Ottley* v. *Browne*, the bill was filed by a banker for an account of shares held on trusts which were contrary to 29 Geo. 2. c. 16. which prohibited bankers from trading; this was also dismissed.

Against these authorities, the cases of *Dover* v. *Opey*, 2 Eq. Ca.

Abr. 7., *Watts* v. *Brook*, 3 Ves. 612, were cited. In *Dover* v. *Opey*, the partnership was for legal purposes, but the defendant committed an illegal act by smuggling, and in *Watts* v. *Brook*, it was held that where a contract was illegal, the court would not conclude the result of it, in decreeing a general account, but this case was disapproved of by Sir W. Grant, in *Knowles* v. *Houghton*, who said it was impossible to reconcile the distinction in that case to his mind.

It was said that some purposes were legal, such as purchasing the lease, dresses, &c., and that so far as they were lawful, the contract ought to be performed; and that the case of *King* v. *Houghton*, was an authority for that; but in that case the part of the joint transaction was in execution of a legal object; and here there was no evidence that a new lease had been granted; besides which, the purchases were made for purposes connected with the contract. In *De Begnis* v. *Armistead*, the plaintiff was not permitted to recover money clearly paid in respect of the illegal contract, such as for dresses, &c., but was allowed to recover £30 borrowed to pay the expenses of the hotel in London, and which were held not to be advanced for the necessary purposes of carrying on the agreement.

It was said, that the plaintiff, at least, ought to recover the money which he had advanced, and that he had a lien on the theatre for the purpose; if the plaintiff was entitled, this was not the court in which the demand could be enforced; and there appeared to be no such case made by the bill which would give the plaintiff the benefit; besides that, the mere payment of money did not constitute a lien.

His Lordship considered that the case was one of great hardship, but it was a thing which was common to cases of that nature. It was said that the defendant offered to return the money; perhaps he would do so now. His Lordship, however, thought the decision of the Vice-Chancellor was supported both by principle and authority; he must, therefore, dismiss the appeal, with costs.

The counsel for the plaintiff having now asked for the money which had been offered and refused, before the hearing of the appeal, Mr. Knight said, the plaintiff having refused it before, could not have it then.

Cases cited for the plaintiff.—Dover v. *Opey*, 2 Eq. Ca. Abr. 7; *Watts* v. *Brook*, 3 Ves. 612; *Knowles* v. *Houghton*, 11 Ves. 108; *Rodwell* v. *Ridge*, 1 Car. & Payne, 220.

Cases cited for the defendant.—De Begnis v. *Armistead*, 10 Bing. 107; *The King* v. *Glossop*, 4 Bar. & Ald. 616; *The King* v. *Neville*, 1 Bar. & Ald. 489; *Gallini* v. *Laboret*, 5 T. R. 244; *Mitchell* v. *Cockburne*, 2 H. Black. 379; *Thomson* v. *Thomson*, 7 Ves. 47; *Ottley* v. *Browne*, 1 Ball. & B. 360; *King* v. *Hardy*, 3 T. R. 286; *Parsons* v. *Chapman*, 5 Carr. & Payne, 33.

VICE CHANCELLOR'S COURT.—Feb. 7, 1837.

Attorney-General *v.* Cowperthwaite.

"*I also bequeath to the Poor Distressed People of Quorndon, in Leicestershire, the Interest of* £1000, *to be paid half-yearly, every Year, but not later,*" *is a good Charitable Bequest.*

Mr. Spence stated that in this case the bill had been filed by the Attorney-General against the personal representatives of George Hyde, to have it declared whether a bequest was a good charitable bequest.

Mr. Spence appeared for the relator.

George Hyde, by his will, after making certain dispositions therein mentioned, said, "I also bequeath to the poor distressed people, of Quorndon, in Leicestershire, the interest of £1000, to be paid half-yearly, every year, but not later."

Mr. Knight appeared for the personal representatives, and Mr. Bethell for other parties, but the case was not argued; his honour's opinion being merely asked, whether it was a good charitable bequest?

The Vice-Chancellor was of opinion that it was, and directed a scheme to be laid before the Master.

Mr. Knight observed, that there was a suit already instituted, called *Hyde* v. *Cullow*, to administer George Hyde's estate, but that the attorney-general had thought fit to institute this suit, for the sole purpose of ascertaining whether this bequest was good or not; Mr. Knight's clients ought, therefore, to be allowed their costs.

Mr. Spence observed, that the object of filing this separate bill was in fact to save expense, because there were many parties interested in the suit of *Hyde* v. *Cullow*, who would all have claimed their costs of appearing.

The Vice-Chancellor, however, thought there was no necessity for a separate suit, and decreed that the costs should be paid out of the charity fund.

LORD CHANCELLOR'S COURT.—Feb. 3 & 4, 1837.

Vernon *v.* Vernon.

Where a Plaintiff inserts two Averments in his Bill, one favourable to himself, and another against himself; the Defendant, for the purpose of Demurrer, has a right to take that Averment which operates against the Plaintiff.

This was an appeal from a decision of the Master of the Rolls, who had allowed a demurrer to the plaintiff's bill, for want of equity, and for want of parties.

It will be unnecessary to go into a detail of the facts of this case, as it was disposed of by a point of pleading.

The short case, however, was this:—J. W. Vernon was entitled, under the will of John Vernon, made in 1765, to an estate for life, and John Vernon, his son, to an estate in tail on the Vernon Plantation in Antigua; and in Sept. 1794, a recovery was suffered by J. W. Vernon and J. Vernon, and the plantation resettled; by which J. W. Vernon took an estate for life, and John Vernon, the son, an estate for life, with remainder to his first and other sons in tail. He had a son, who was the present plaintiff, also named John Vernon.

In 1785, J. W. Vernon demised the plantation, with the slaves, to Justinian Cassmajor, for fourteen years, at the rent of £1500 a year.

In 1794, Cassmajor removed forty-nine slaves from the plantation to a neighbouring plantation, called Hawk's-bill; and in 1813, he sold the slaves on that estate to a Mr. Punnett, who removed them to his estate of Mustrique, in the island of St. Vincents; in 1798, the lease was renewed, and in 1808, it was again renewed; and John Vernon was made a party. Cassmajor continued tenant of the plantation till his death, in June, 1820; and Newman and J. Vernon were his personal representatives.

In October, 1821, which was soon after the death of Cassmajor, Newman, his personal representative, obtained a release to be executed by J. Vernon, the father to Punnett, in respect of the slaves having been removed.

The bill stated, that the plaintiff had only lately discovered that the slaves had been removed.

J. W. Vernon lived till lately. The other defendant was John Vernon, the plaintiff's father, who was out of the jurisdiction of the court. The other defendants (who put in the demurrer) were Messrs. Fraser, Alexander, Neilson, and Alexander, mortgagees of Punnett. Messrs. Fraser and Co. had put in a claim for the compensation-money, awarded by the commissioners for the slaves on the estate mortgaged to them; a part of whom, it was alleged, were those removed from the Vernon plantation; and the bill prayed an injunction against their receiving that money.

It was admitted that the trustees of the settlement ought to have been made parties.

The question was, whether J. W. Vernon and J. Vernon his son, knew of the removal of the slaves; there was an allegation that J. Vernon did not know of the removal of the slaves; but there was no allegation to that effect, as to John Vernon the son. The Master of the Rolls said that, notwithstanding the averment to the contrary, he could not bring himself to believe that J. W. Vernon was not conusant of the fact of the slaves having been removed; but, on the contrary, he found that these facts were known from the beginning to both parties. There was also an averment, that John

Vernon, the father, was tenant in tail, according to the settlement of 1794; in which, however, it appeared, that he was only tenant for life; and the plaintiff, his son, was called in the bill, heir apparent in tail.

Mr. Wigram and Mr. Moore appeared for the plaintiffs, and Sir W. Horne, Mr. Russell, and Mr. Lewis, appeared for the defendants.

The Lord Chancellor, in giving judgment, said, this was an appeal from a decision of the Master of the Rolls; the case having been brought before him for want of equity, and for want of parties. The Master of the Rolls was of opinion that the demurrer for want of equity was right, it being admitted that the bill was defective, for want of parties. His Lordship was at a loss to know why the parties should have incurred the expense of this appeal, when there was an admission that the bill was defective for want of parties. The expense would have been avoided by amending the bill without coming into that court. The sole question then was, whether the plaintiff should now be allowed to amend his bill. There was no doubt that where the plaintiff stated in his bill a fact one way, and in another part of the bill he stated the fact another way, the defendant had a right, in demurring, to take that averment which operated most against the interest of the party stating it. The Master of the Rolls considered that there was no allegation that the slaves had not been removed previously to September, 1794, when the settlement was made; at which time J. W. Vernon was tenant for life, and John Vernon tenant in tail. There was an allegation that the slaves were removed in 1794; but not whether it was before September in that year. And as it afterwards appeared, that John Vernon, in 1821, indemnified Cassmajor from the consequences of the acts which the tenant at that time had committed by appropriating these slaves to himself, at a time when the tenant sold them to another person, and received from the purchaser their value, it was very singular that, under those circumstances, J. Vernon should be stated not to be conusant of the act. His Lordship found a statement, that J. W. Vernon was not conusant, but he found no statement as to J. Vernon's conusance, and in the absence of any allegation that he did not know, there were strong reasons to suspect that he did know. The removal of the slaves was stated to have taken place in 1794. If it took place before the settlement of 1794, John Vernon was tenant in tail, and his father was tenant for life.—There was sufficient allegation that the father did not know, but not that the son did not know; and, coupled with the circumstance that he was a party to the recovery and the settlement, by which the slaves belonging to the plantation were settled, it appeared difficult to see how he could afterwards be ignorant of the slaves having been removed. The Master of the Rolls came to the conclusion, that, notwithstanding the allegation in the bill, there was sufficient to justify him in saying, that J. W. Vernon was also conusant; the allegation distinctly alleged that J. W. Vernon was

not conusant. His Lordship agreed with the Master of the Rolls, so far as that J. Vernon was conusant, in the absence of any allegation that he was not. And it appeared to his Lordship, that there was sufficient to justify the Master of the Rolls in the decision which he had come to. His Lordship thought there was sufficient allegation to trace the slaves. The bill stated the settlement of 1794, by which the plaintiff undoubtedly was first tenant in tail, and his father was tenant for life; the parties had thought fit to represent that which was stated in the bill; it might or might not be true; but for the purposes of the demurrer, it was sufficient if it appeared in the bill. The plaintiff was also wrong in stating that John Vernon, the father, was first tenant in tail in remainder; for, according to the settlement of 1794, he was second tenant for life; but the settlement might or might not have been correctly copied. The bill also stated that the plaintiff was entitled as the eldest son and heir of John Vernon; how could that be? for it seemed that J. Vernon was tenant for life, and the plaintiff the first tenant in tail in remainder; so that, in point of fact, it would appear by the bill that John Vernon was tenant in tail, and the plaintiff claimed as his issue in tail; and if that was so, he had no right to file this bill. His Lordship again repeated, that if a party pleading made a statement one way, and a statement the other way, the defendant might take advantage of that statement which operated most against the plaintiff. There was evidently a mistake in the bill. His Lordship must, however, dismiss the bill with costs; but, as it was quite clear that the suit must be prosecuted, his Lordship would give leave to amend the bill.

FEB. 7 & 8, 1837.

LLOYD *v.* LLOYD.

When mutual Covenants contained in Marriage Articles are ambiguous and contradictory, the Court will put such a Construction on the whole of the Articles so as to meet the Intention of the Parties; and though one Party fails in performing his Covenant, it will enforce the Performance of the Covenant by the other Party.

This was an appeal from the decision of the Vice-Chancellor, reported ante, p. 33. Owing to the length of the judgment, we have not room to notice any of the arguments. Mr. Wigram, Mr. Wilbraham, and Mr. Girdlestone, appeared in support of the decree, and Mr. Jacobs and Mr. Pullen against it.

The LORD CHANCELLOR said that the case turned on the question respecting marriage articles made in 1777. It appeared that an intended marriage was agreed upon, and the intended husband's name was Lloyd, and the intended wife's name was Stephens. In the articles of settlement entered into between the two families, certain property was agreed to be settled on the part of the father of the intended husband, of which he was seised in fee; and

Vernon, the father, was tenant in tail, according to the settlement of 1794; in which, however, it appeared, that he was only tenant for life; and the plaintiff, his son, was called in the bill, heir apparent in tail.

Mr. Wigram and Mr. Moore appeared for the plaintiffs, and Sir W. Horne, Mr. Russell, and Mr. Lewis, appeared for the defendants.

The Lord Chancellor, in giving judgment, said, this was an appeal from a decision of the Master of the Rolls; the case having been brought before him for want of equity, and for want of parties. The Master of the Rolls was of opinion that the demurrer for want of equity was right, it being admitted that the bill was defective, for want of parties. His Lordship was at a loss to know why the parties should have incurred the expense of this appeal, when there was an admission that the bill was defective for want of parties. The expense would have been avoided by amending the bill without coming into that court. The sole question then was, whether the plaintiff should now be allowed to amend his bill. There was no doubt that where the plaintiff stated in his bill a fact one way, and in another part of the bill he stated the fact another way, the defendant had a right, in demurring, to take that averment which operated most against the interest of the party stating it. The Master of the Rolls considered that there was no allegation that the slaves had not been removed previously to September, 1794, when the settlement was made; at which time J. W. Vernon was tenant for life, and John Vernon tenant in tail. There was an allegation that the slaves were removed in 1794; but not whether it was before September in that year. And as it afterwards appeared, that John Vernon, in 1821, indemnified Cassmajor from the consequences of the acts which the tenant at that time had committed by appropriating these slaves to himself, at a time when the tenant sold them to another person, and received from the purchaser their value, it was very singular that, under those circumstances, J. Vernon should be stated not to be conusant of the act. His Lordship found a statement, that J. W. Vernon was not conusant, but he found no statement as to J. Vernon's conusance, and in the absence of any allegation that he did not know, there were strong reasons to suspect that he did know. The removal of the slaves was stated to have taken place in 1794. If it took place before the settlement of 1794, John Vernon was tenant in tail, and his father was tenant for life.—There was sufficient allegation that the father did not know, but not that the son did not know; and, coupled with the circumstance that he was a party to the recovery and the settlement, by which the slaves belonging to the plantation were settled, it appeared difficult to see how he could afterwards be ignorant of the slaves having been removed. The Master of the Rolls came to the conclusion, that, notwithstanding the allegation in the bill, there was sufficient to justify him in saying, that J. W. Vernon was also conusant; the allegation distinctly alleged that J. W. Vernon was

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When mutual Covenants contained in Marriage Articles are ambiguous and contradictory, the Court will put such a Construction on the whole of the Articles so as to meet the Intention of the Parties; and though one Party fails in performing his Covenant, it will enforce the Performance of the Covenant by the other Party.

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The LORD CHANCELLOR said that the case turned on the question respecting marriage articles made in 1777. It appeared that an intended marriage was agreed upon, and the intended husband's name was Lloyd, and the intended wife's name was Stephens. In the articles of settlement entered into between the two families, certain property was agreed to be settled on the part of the father of the intended husband, of which he was seised in fee; and

Vernon, the father, was tenant in tail, according to the settlement of 1794; in which, however, it appeared, that he was only tenant for life; and the plaintiff, his son, was called in the bill, heir apparent in tail.

Mr. Wigram and Mr. Moore appeared for the plaintiffs, and Sir W. Horne, Mr. Russell, and Mr. Lewis, appeared for the defendants.

The Lord Chancellor, in giving judgment, said, this was an appeal from a decision of the Master of the Rolls; the case having been brought before him for want of equity, and for want of parties. The Master of the Rolls was of opinion that the demurrer for want of equity was right, it being admitted that the bill was defective, for want of parties. His Lordship was at a loss to know why the parties should have incurred the expense of this appeal, when there was an admission that the bill was defective for want of parties. The expense would have been avoided by amending the bill without coming into that court. The sole question then was, whether the plaintiff should now be allowed to amend his bill. There was no doubt that where the plaintiff stated in his bill a fact one way, and in another part of the bill he stated the fact another way, the defendant had a right, in demurring, to take that averment which operated most against the interest of the party stating it. The Master of the Rolls considered that there was no allegation that the slaves had not been removed previously to September, 1794, when the settlement was made; at which time J. W. Vernon was tenant for life, and John Vernon tenant in tail. There was an allegation that the slaves were removed in 1794; but not whether it was before September in that year. And as it afterwards appeared, that John Vernon, in 1821, indemnified Cassmajor from the consequences of the acts which the tenant at that time had committed by appropriating these slaves to himself, at a time when the tenant sold them to another person, and received from the purchaser their value, it was very singular that, under those circumstances, J. Vernon should be stated not to be conusant of the act. His Lordship found a statement, that J. W. Vernon was not conusant, but he found no statement as to J. Vernon's conusance, and in the absence of any allegation that he did not know, there were strong reasons to suspect that he did know. The removal of the slaves was stated to have taken place in 1794. If it took place before the settlement of 1794, John Vernon was tenant in tail, and his father was tenant for life.—There was sufficient allegation that the father did not know, but not that the son did not know; and, coupled with the circumstance that he was a party to the recovery and the settlement, by which the slaves belonging to the plantation were settled, it appeared difficult to see how he could afterwards be ignorant of the slaves having been removed. The Master of the Rolls came to the conclusion, that, notwithstanding the allegation in the bill, there was sufficient to justify him in saying, that J. W. Vernon was also conusant; the allegation distinctly alleged that J. W. Vernon was

not conusant. His Lordship agreed with the Master of the Rolls, so far as that J. Vernon was conusant, in the absence of any allegation that he was not. And it appeared to his Lordship, that there was sufficient to justify the Master of the Rolls in the decision which he had come to. His Lordship thought there was sufficient allegation to trace the slaves. The bill stated the settlement of 1794, by which the plaintiff undoubtedly was first tenant in tail, and his father was tenant for life; the parties had thought fit to represent that which was stated in the bill; it might or might not be true; but for the purposes of the demurrer, it was sufficient if it appeared in the bill. The plaintiff was also wrong in stating that John Vernon, the father, was first tenant in tail in remainder; for, according to the settlement of 1794, he was second tenant for life; but the settlement might or might not have been correctly copied. The bill also stated that the plaintiff was entitled as the eldest son and heir of John Vernon; how could that be? for it seemed that J. Vernon was tenant for life, and the plaintiff the first tenant in tail in remainder; so that, in point of fact, it would appear by the bill that John Vernon was tenant in tail, and the plaintiff claimed as his issue in tail; and if that was so, he had no right to file this bill. His Lordship again repeated, that if a party pleading made a statement one way, and a statement the other way, the defendant might take advantage of that statement which operated most against the plaintiff. There was evidently a mistake in the bill. His Lordship must, however, dismiss the bill with costs; but, as it was quite clear that the suit must be prosecuted, his Lordship would give leave to amend the bill.

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there was other property agreed to be settled by the family of the Stephens, who were seised of it under these circumstances, the father and mother were tenants for life, and the intended wife was tenant in tail of a moiety. It also appeared that the property belonging to Stephens was subject to a mortgage; and the marriage taking place in 1777, and the mortgagee being foreclosed in 1784, the property became lost to the family. The bill was brought for the purpose of having the articles carried into execution. No settlement was executed, and no conveyance made of the property of the family of the husband, and, on his death, that property, (not being conveyed,) descended to his eldest son, who devised it to the person who was the defendant on the record. The second son of the marriage claimed the benefit of the articles. The ground of the plaintiff's demand was, that the articles were so formed as not to exonerate William Lloyd the elder from any obligation to settle his estate, because Stephens did not settle his, and that he did not thereby become relieved from the obligations to settle his estate. The question turned on the construction of the whole context of the marriage articles.

Esther Stephens, the intended wife, was under age at the time the marriage took place; therefore, it was impossible to carry into effect the intention of the parties by settling that part of which she was tenant in tail. The intention was, that, on her attaining the age of twenty-one years, the father, mother, and daughter should bar the entail, and settle the property according to the articles. (His Lordship then read the recitals in the articles,) and said—It was to be observed, that it was very important clearly to see what was the meaning of the parties expressed in these recitals. There was no time mentioned for conveying and settling, but the time was mentioned for payment of the £200, which was to be at the solemnization of the intended marriage. It was quite clear, according to the contract stated in the recitals, that Lloyd's father would be bound to pay £200, and settle the estates; but when the articles took notice of the recitals as to Stephens, there was a marked distinction between the time of payment of the £200 and the time of settling the property. It was clear that the estate was to be settled when the daughter attained twenty-one, but the £200 was to be paid at the time of the marriage. The parties then enter into distinct covenants. Evan Lloyd the elder covenanted that, in case the marriage took effect, and Stephens did, when Esther Stephens attained twenty-one, by conveyance, fine, &c. convey and settle a moiety of the messuages, &c., then he, Lloyd, would convey and settle his property; but it appeared that the property of Stephens could not be settled till Esther Stephens attained twenty-one, and by the articles the covenant of Stephens was to precede that of Lloyd, which could not take place at the period which E. Lloyd the elder agreed to settle his estates, because they were to be limited to the use of Evan Lloyd the elder till the

intended marriage should be solemnised; so that here was a covenant which, if construed strictly, could not take place till some considerable period after the marriage, and as the uses were for the father until the solemnisation of the marriage, it would be inconsistent, and the two provisions could not stand together. Then the covenant on the part of Stephens followed, in which he covenanted that his wife and daughter, and all necessary parties, should settle the moiety of their property if Lloyd settled his; so that Lloyd was to wait for the performance of Stephens's covenant, and Stephens was to wait for the performance of Lloyd's covenant; that was the form of the settlement; then there followed the covenants to pay the £200; then followed a charge for younger children of £600 on the estates, as Evan Lloyd the younger, and Esther his intended wife should appoint. It was contended, on the part of the defendant, that the covenant on the part of Stephens was to precede that of Lloyd, and that as Stephens had failed to perform his covenant, that Lloyd was not to perform his.

His Lordship, however, said, that the question was, whether there was sufficient in the articles to ascertain the intention of the families. It was admitted on both sides, and all the cases proved, that in the construction of marriage articles, no failure on the part of one to perform his contract, would absolve the other party from performing his; but then it was said that, in this case, the performance of one covenant was made to depend on the performance of the other; but his Lordship said, that that was not the case where the covenants were for the benefit of third parties. In support of the plaintiff's case was cited the cases collected in the note in 1 Saunders' Rep. 320, Serjt. Williams's ed., where the Court had construed the terms of covenants for the purpose of carrying into effect the intention of the parties and the good sense of the case. One of the cases referred to was the case of *Boone* v. *Eyre*, 1 H. Black. 273, where the covenant was for payment of an annuity in consideration of a plantation being conveyed, and it was made to depend on the performance of the covenants of the other party, amongst which were a covenant for title; and the plea was, that the covenantee was not legally possessed of the negroes; and yet it was held, that the annuity was payable; and the same principles were laid down in the case of *Kentish* v. *Newman*, 1 P. W. 234. A very strong authority, on the part of the defendant, was cited in 2 Mer. 30, (*Sumner* v. *Powell*,) to impeach these cases, it was said that Sir William Grant would not put any other construction on the covenant inconsistent with the terms of the covenant; but Sir William Grant never intended to impeach the right which the Court had, where it had materials, of construing a joint covenant to be a several covenant. In the case of *Sumner* v. *Powell*, Sir W. Grant drew a distinction between that case and a case where the circumstances between the parties were such as to autho-

rize the Court to depart from the strict legal rules in construing a joint covenant to be a several covenant; but it was an authority for showing that, where the Court could not put any but a strict construction, it refused to interfere; but where the contract had in part been performed, or where it found, on the face of the instrument, that there were materials by which it could put a construction to meet the intentions of the parties, it would not then be bound by strict rules.

In this case before his Lordship, there was an agreement to provide for the husband and wife and the children, and, looking at the whole of the articles, they left no doubt as to the object of the covenants both by Lloyd and Stephens. It was argued that these covenants must be simultaneous; but, even if they were, his Lordship did not intend to follow the strict literal meaning of the words against the intention of the parties. And his Lordship was of opinion that Lloyd's liability to settle was not removed by the failure on the part of Stephens to perform his part of the agreement, but that as there was so much obscurity in this case he could not give the plaintiff his costs.

JAN. 25, 1836.

TYLER *v.* BELL.

The Estate of a Husband whose Wife was Administratrix, is not liable, if the Estate of the Intestate is sufficient to answer the Demand.

If a Person dies intestate in India, no Suit can be instituted in this Court in respect of the Deceased's Estate, without taking out Administration in this Country, and bringing the Administrator before the Court.

On a Demurrer for want of Parties being allowed, the Court will not give leave to amend, if it sees that the Plaintiff can have no Relief if amended.

In this case (which was argued on the 22d of Jan.) Mr. Tinney and Mr. Craig appeared for the plaintiff, and the Solicitor-General and Mr. J. Russell for the defendants.

The LORD CHANCELLOR, in delivering judgment, said, this was an appeal from an order of the Master of the Rolls, who allowed a demurrer to a bill for want of parties, and did not give leave to amend. The bill stated that William Mostopp died in the East Indies in 1801, and left a widow and one child named Margaret Maria, and the widow obtained administration in Calcutta, and received one-third of the personal estate to her own use, and retained two-thirds for the daughter, the bill did not state the amount of the estate. The widow, in 1801, married G. P. Tyler. In 1803, Mr. and Mrs. Tyler placed 269,000 Sicca rupees, being two-thirds of Margaret Maria's share, in the hands of Mr. William Fairlie, of Calcutta, and in 1803 the plaintiff, who was the eldest child of Mr. and Mrs. Tyler, was born; in 1804, Margaret Maria, who was the plaintiff's half-sister, died, and letters of administration were

granted out of the Court of Calcutta to Mrs. Tyler, and the 269,000 Sicca rupees, described as part of Margaret Maria's estate, in the hands of Fairlie, accumulated till 1814, at which time the bill alleged that that sum and the accumulations were transferred by W. Fairlie to Mrs. Tyler, with the privity of Mr. G. P. Tyler, the husband. It stated the will of Mr. Tyler and his death, in 1834, and Mrs. Tyler was appointed executrix and residuary legatee. Mrs. Tyler proved the will in Calcutta, and possessed herself of the estates, which were more than sufficient to pay the plaintiff's demand, after payment of the debts, all of which had been paid. Letters of administration in 1835 were granted to P. Bell in this country, until Mrs. Tyler should apply for the same. In 1806, the plaintiff was sent to England; he was then only seven years of age, and it was only then discovered that he was entitled to one-half of the 269,000 Sicca rupees, and all the residue of Margaret Maria's estate, and application was made to Mr. Tyler during his life, and after his death to Mrs. Tyler, and to P. Bell, as administrator, for payment. The bill did not state that any application was made to Mrs. Tyler, as the administratrix of Margaret Maria. For the plaintiff, it was contended that he was entitled to one-half of the 269,000 Sicca rupees, and to all the residuary personal estate of Margaret Maria, and that as Mrs. Tyler was representative of Margaret Maria, and next of kin of two-thirds of the estate, and being at the time of the marriage with Tyler possessed of the 269,000 Sicca rupees in Fairlie's hands, that Tyler's estate was liable to the amount of all the estate possessed by him or by Mrs. Tyler as such administratrix, and that he was trustee for the plaintiff of one-half of the 269,000 rupees, and of the personal estate; and the bill prayed an account of Margaret Maria Mostopp's estate, received by Mr. and Mrs. Tyler; and that Mrs. Tyler and Mr. Bell as the representative of Mr. Tyler, might be held liable to the plaintiff for the 269,000 rupees, and of half of the personal estate.

Mr. Bell represented the estate only of Mr. Tyler in this country. Mrs. Tyler was still residing in Bengal, and out of the jurisdiction of this court. It was contended, that if Mr. Tyler's estate had been liable to the plaintiff at any time, it was no longer so, as Mrs. Tyler was stated by the bill to have received back from Fairlie all the estate in his hands, with the concurrence of her husband, and that the estate of Margaret Maria was alone liable, and that there was no representative of her before the court.

On the other side it was contended that Margaret Maria had no property in this country, and that the administration in Calcutta was sufficient to maintain the suit here, and that the Ecclesiastical Court in this country would not grant administration if there was no property to be administered. Yet, his Lordship observed, the plaintiff asked for liberty to amend in order to obtain administration here.

His Lordship, however, was of opinion that the suit could not be carried on in the absence of a personal representative in this country. As to the estate of G. P. Tyler being liable, his Lordship said that the case of *Adair* v. *Shaw*, 1 Scho. and Lef. 266, decided that where administration was taken out with the consent of the husband, any dealing with the wife would bind him, and that the executors of the husband would be liable; but in this case the plaintiff could have relief out of the assets of Margaret Maria's estate, without bringing any representative of Mr. Tyler before the Court, and that his estate was indemnified on account of another estate, which was that of Margaret Maria, to whom there was no representative before the Court.

The cases of *Turton* v. *Flower*, 3 P. W. 371; *Atkins* v. *Smith*, 2 Atk 63; *Lowe* v. *Farlie*, 2 Mad. 101, all proceeded on the principles that the courts in this country would not admit a suit to be decided in the absence of a person appointed to administer in this country; it did not matter in which ecclesiastical court administration was taken out, provided such administration be taken out in this country. The case of the *Attorney-General* v. *Dimond*, 1 Crom. and J. 356, only decided that the probate duty was not payable in respect of property in a foreign country belonging to a person dying in this country, although the property be brought into administration in this country by the executors.

But in another case in the same volume, *Re Ewin*, 1 Crom. and J. 151, the executor, under the same circumstances, was held liable to pay the legacy duty, although in respect of foreign funds. In *Re Bruce*, 2 Crom. and J. 450, the will which was not proved in this country, of a foreigner who died abroad, was not liable to the legacy duty.

The case of *Anderson* v. *Carter*, 2 M. and K. 763, was cited for the plaintiff, but it appeared to his Lordship difficult to reconcile the statement of facts, with what was there attributed as having been said by the Court.

His Lordship was of opinion that the objection for want of parties was good. When it was said that the Court permitted the plaintiff to amend his bill as of course, and that a bill was never dismissed for want of parties, nothing more was inferred than that the bill should not be dismissed if the plaintiff appeared to be entitled to have relief, but if the Court saw that the plaintiff could have no relief under any circumstances, it would not give leave to amend. The case of *Lowe* v. *Farlie*, 2 Mad. 106, clearly showed that a discretion had been exercised by the Court as to permitting a bill to be amended; but then it was said that the case of (we believe) *Milligan* v. *Mitchell*, 1 Mil. and C. 433, was conclusive of the plaintiff's right to amend; but on looking at the case it certainly appeared not to be so decided.

His Lordship was therefore of opinion that this case was defective for want of parties; and as the case was stated, it also appeared im-

possible to give relief even if the bill was amended, so that his Lordship could not give permission to amend the bill, but must dismiss the appeal with costs.

FEB. 8, 1837.

RENWICK *v.* HARPER.

Negative Plea must not be formed from the stating Part of the Bill only, but must be taken as well from the interrogating Part of the Bill.

In this case a bill had been filed to redeem a mortgage.

The bill stated that the plaintiff was a judgment-creditor, and that previous to June, 1834, a person named Wilton was entitled to £173, expectant on the death of A. Holt, who died in 1834, that and suppose no charge or mortgage could be shown on the estate in possession, it would be liable to the judgment of the plaintiff. It then stated that Wilton borrowed of Harper £1,800, and then he charged that certain indentures of lease and release were executed to secure the repayment thereof, but he did not know the contents of the security which the defendant obtained, and it then charged that the defendant ought to set forth the deeds, and the parties' names, and material contents of the deeds, and what was due to him, on the security of the said mortgage premises. It then interrogated whether for securing the re-payment of the money, or for what other purposes, the indentures were not executed, and whether Wilton did not thereby, or otherwise, or how, convey and assure some or what part of his interest in the mortgaged premises to the defendant Harper?

Harper pleaded that he did not borrow the £1,800, or any other sum of money, and for securing the re-payment thereof the indentures, or any other indenture, was not executed, whereby Wilton consigned all his estate and interest to the defendant and his heirs.

The Vice-Chancellor overruled the plea, saying it might have been true that the £1,800 was not due, but the defendant might have obtained an assignment of the mortgaged premises; it might have been true that Wilton did not convey, but some trustee might, or there might have been some prior mortgage, under which the defendant might have obtained some interest.

Mr. Wakefield and Mr. Cole, for the plaintiff, contended that the very form of the plea showed that the defendant had a redeemable interest; that the plea took a passage from the stating part of the bill, and put it into the shape of, and called it, a plea; that a party pleading ought to form his plea from the interrogating part of the bill, and not from the stating part of the bill. That Wilton might have conveyed a term or other less interest than the freehold, and the words which the defendant used, viz. unto the defendant "and his heirs," would have been quite consistent; and there might also have been a mortgage by deposit of title deeds. The defendant did not negative that he had title deeds in his possession;

the bill referred to the title deeds which ought to have been set forth.

Mr. Spence and Mr. Cooper appeared for the defendant, and submitted that the defendant had sufficiently shown that he held no mortgage on the premises.

The LORD CHANCELLOR, in giving judgment, said, it was not necessary for the plaintiff to have amended his bill, it would have been better if, instead of the plea being filed, the defendant had informed the plaintiff by answer. The plaintiff stated that he had no knowledge of the instrument stated, and that Wilton had, by indentures of lease and release, conveyed an estate to Harper, subject to redemption, for securing £1,800, that being alleged as money borrowed by him of Harper; but by the interrogating part of the bill, the plaintiff asked whether the loan took place, and whether for the purpose of the security thereof and interest, indentures of lease and release were not executed, and whether Wilton did not thereby, or otherwise, or how convey all, or some, or what part of his interest to Harper? But the defendant, in putting in his plea, entirely culled it from the stating part of the bill; he said that no such sum was borrowed as £1,800, or any other sum, and for securing the repayment thereof, indentures of lease and release were not executed; supposing there was no loan, or suppose the charge was originally by transfer of security, by which Harper had a charge on the estate, but which was not an alienation of the whole interest of Wilton to Harper to secure the repayment of the debt, the plea in that case would entirely meet the inquiry set forth in the stating part of the bill, for it was contended that no such indentures were executed, but if he had taken his plea from the interrogating part of the bill, he could not have answered in those terms. Undoubtedly the plea might be true according to the plaintiff's statement in the bill, but it would be unjust if in constructing the plea it was not to be taken from the interrogating part of the bill, as well as out of the statement of the bill. His Lordship thought that there was sufficient matter of inquiry that this plea did not cover, so that his Lordship must overrule the plea, and dismiss the appeal with costs.

ROLLS' COURT.—FEB. 20, 1837.

LE GRICE *v.* USTRICKE.

A Defendant may object because certain Trustees, (who are directed by a Will to pay Debts, were not made Parties, though he says, by his Answer, that he is the only Party entitled.

A testator, in this case, made two wills, one in 1807, and the other in January, 1821; and the object of the bill was to establish the will of 1807, under which the plaintiff claimed as tenant for life, and his daughter as tenant in tail.

The bill stated that the testator made his will in January, 1821, by which he devised to three trustees, in trust, after payment of the testator's debts, upon certain trusts in the will mentioned.

Mr. Tinney and Mr. Richards took a preliminary objection, that the devisees in trust were not before the court.

Mr. Kindersley, for the plaintiffs, said, that they (who were, Mr. Le Grice and his daughter,) claimed under the will of 1807, and the heir at law claimed under a total intestacy, and Mr. Peters claimed under the will of 1821; that there was no necessity to have any other person before the court, except the heir at law and the equitable owner of the estate under the will of 1821; that Peters, by his answer, claimed the whole of the estate; how, then, could he say that there was another party necessary?

The MASTER of the ROLLS, however, said, that Peters had not the whole beneficial interest, because there was a trust for payment of debts, and if the trustees were not made parties, there would be nobody to represent the creditors.

VICE-CHANCELLOR'S COURT.—JAN. 24, 1837.

DAVENPORT *v.* WHITMORE.

The Court will, under special Circumstances, such as the Illness of a Master, dispense with the strict Observance of the General Orders of the Court, and enlarge the Time for referring an Answer for Insufficiency.

Sir William Horne applied to his Honour to enlarge the time for referring the answer of the defendant for insufficiency.

It will appear, by the case reported ante, p. 166, that a demurrer had been allowed by the Master of the Rolls to a bill for, (amongst other things, an injunction to restrain proceedings at law,) which decision had been overruled by the Lord Chancellor. The answer was put in on the demurrer being overruled, and a reference for insufficiency was made, but not within due time, and the reason alleged was, that Master Martin, to whom the reference had been made, could not attend chambers on account of illness. Sir W. Horne was opposed by Mr. Richards.

The VICE-CHANCELLOR observed, that the Masters now had a secret mode of distributing the business amongst themselves, which was known to nobody but to the brokers themselves, by which a great deal of business was delayed in the event of any Master being unable to attend. His Honour was of opinion that in extreme cases he had power to dispense with the ordinary rules of the court, such as in the case of the illness of Masters; and that, as Master Martin was disabled which prevented the matter from being heard; there was, therefore, sufficient special circumstances in the case for his Honour to make the order.

His Honour ordered that the injunction should be revived, and

the exceptions should be referred to Master Brougham; and the parties were to obtain a report in four days, otherwise the injunction should be dissolved.

LORD CHANCELLOR'S COURT.—Feb. 15, 1837.

Southby *v.* Hutt.

A Vendor who, by one of the Conditions of Sale, undertakes to Deduce a good Title to the Property sold, is bound to verify the Abstract with the Title Deeds, as well in his Possession as not in his Possession, though he stipulates by another Condition that he "shall not be bound or required to produce any Original Deed and other Documents than those in his Possession, and set forth in the Abstract, or which relate to other Property.

In this case, which was argued on the 2d and 3d of Feb. Mr. Wigram and Mr. Perry appeared for the plaintiff, and Mr. Tinney and Mr. Bagshaw appeared for the defendant.

Owing to the length of the judgment we have room only for a copy of the 4th and 6th conditions of sale, upon which the question turned.

4th. The vendor will, at his own expense, deliver an abstract of the title to the purchaser, or his solicitor, of the first seven lots, and lot 33, within 21 days from the day of the sale, and deduce a good title; but as to such parts of the lands as were allotted or taken in exchange under the award of the commissioners of the Appleton inclosure, the purchasers shall not be at liberty to require, and the vendor shall not be bound to shew any title thereto prior to the said award, from which period the title to such lands will be deduced. The purchaser shall, within the next 21 days after the delivery of the abstract, declare, in writing, his acceptance or disapproval of the title, after which he is to be precluded from raising objections, and in case objections are made within that period, the vendor shall be at liberty to vacate the sale upon returning the deposit, without interest, auction duty, or further compensation.

6th. The vendor will deliver up to the purchaser of the greater part in value of the said estate, all the title deeds, and copies of deeds, and other documents in his custody, *but shall not be bound or required to produce any original deed and other documents than those in his possession, and set forth in the abstract, or which relate to other property;* and such purchaser is to enter into the usual covenants for the production of the title deeds to the purchaser or purchasers, or proprietor of the remaining or other lots; but if the largest portion in value of the estate shall remain unsold, the vendor shall be entitled to retain the deeds upon entering into such covenants; all such covenants to be prepared by, and at the expense of,

the person or persons requiring the same, who may have attested copies of such deeds at his, her, or their own expense.

Mr. Hutt was the purchaser of lots 6, 25, and 31.

The Lord Chancellor, in giving judgment, said, that this was a bill filed for the specific performance of a contract; the bill prayed a specific performance might be declared, and that the defendant had accepted the title to the premises. The decree made in the Rolls, on the hearing of the cause, was not according to the prayer of the bill, but it declared that the purchaser should not be entitled to have the benefit of examining the abstract with the original title deeds, other than those in the possession of the vendor; but it did not decree, as prayed, that the purchaser had accepted the title. On what grounds the decree had proceeded, his Lordship was at a loss to account, but he supposed it must have been by agreement between the parties. (Mr. Tinney here observed that he had not agreed to it.)

His Lordship said that the premises had been put up to sale, by public auction in 1833, subject to certain conditions of sale. By the 4th condition, the vendors were to deliver an abstract within 21 days from the day of sale, and deliver a good title, except to certain lands, of which the purchaser should not be at liberty to require, or the vendor bound to show, any title thereto, prior to the award. By the 5th condition, after payment of the purchase-money, the vendor was to convey to the purchaser; and by the 6th condition, the vendor was to deliver up to the purchaser of the greater part in value of the said estate, all title deeds relating to the property in question, but he was not bound to produce any original deeds, but those in his possession, and set forth in the abstract, or which related to other property; and the purchaser was to enter into covenants for the production of the title deeds. The purchaser was to have attested copies of deeds at his own expense.

The abstract of title was not delivered within 21 days, but no question arose on that point.

The abstract stated certain deeds which, if verified, showed a good title. The question was whether the vendors were bound to verify the title other than and except by deeds in their possession?

In the margin of the abstract of title were written opposite one of the abstracted deeds, "an attested copy of this indenture will be produced, but not the original, which is not in the possession of the vendor." The same observation was written in an another part of the abstract.

And in another part it was written, "this is not in the possession of the vendor, and it relates to other property of a greater value." A long correspondence then took place between the solicitors; the question was whether that correspondence waved the purchaser's right to have a good title? The decree at the Rolls did not declare whether it did or not, but it merely said that the vendor should not

be obliged to verify the abstract, except with those deeds which were in his possession.

It was obvious that however good the title might appear on the abstract, it was not sure that a good title could be made without the title deeds, but then it was stipulated by the vendor that the purchaser should have the benefit of a good title.

The case of *Freme* v. *Wright*, 4 Mad. 364, undeniably established that a vendor might make stipulations as to his title, but if he did so he must make them intelligible to the purchaser; but could a purchaser understand these conditions when it was stipulated that the purchaser should have a good title, and that he was not to verify abstract with the title deeds? It would be a mere mockery to say he could, for he might be bound to accept the estate without any title at all. The subsequent part of the condition proved what was meant by the word "deduced," for it provided that the purchaser was not to investigate the title as to certain allotted lands; for it said, "that the purchaser shall not be at liberty to require, and the vendor shall not be required to show, any title deeds prior to the award.

Had the 4th condition stood by itself there would have been no doubt, but it was made still more evident by the vendor's stating in the 6th condition that he should not be required to deduce a title to the other portion of the property, which showed that he intended to make a good title to the remaining part. His Lordship again went through the conditions of sale. It was said that the purchaser might stipulate that he was not to be required to produce documents which he had not the means of producing; but were these words used in that sense? The words he has used "were any deeds in his possession," but it did not say of which he had no means of producing. It did not follow that the vendor could not verify the title because the deeds were not in his possession. Could it be inferred, by the purchaser, that the restriction was to apply to producing them for the purpose of verifying the abstract? Would the Court compel a purchaser to take the title without their production for the purpose of verifying the abstract? His Lordship observed that he could not say the purchaser should be compelled to complete the purchase without a good title. The abstract merely gave the substance of the deeds, and if certain deeds were not in the power of the vendors, it by no means followed that he could not verify some of them at least, such as those executed so late as 1813 and 1818, and even at a later period; and some were so recent that it was scarcely possible that any difficulty could occur. It was said that, by the correspondence, the purchaser agreed to accept the title as it stood. His Lordship could not object to his taking it, provided that was the case, but the decree did not proceed on that ground; but it seemed that the Master of the Rolls declared that the purchaser had no right to have the abstract verified, except so far as with thedocuments in the vendor's pos-

session. His Lordship's present impression however was confined to a case on which the decree at the rolls did not proceed.

The purchaser contracted to have a good title, but he found on the abstract being delivered, that it was not to be verified with the original documents. The question was whether the correspondence was a waiver of his right to have a good title?

His Lordship then read the correspondence between the parties, and observed that it could not be said to have been a waiver of the purchaser's right to have a good title. It only therefore remained for his Lordship to decide on the construction of the conditions, and his Lordship was of opinion that the conditions did not preclude the purchaser from requiring a good title. Lord Eldon, in his judgment (in a case, the name of which we could not hear), said much in confirmation of his Lordship's opinion.

His Lordship directed that it should be referred to the Master, to see if the vendor could make out and verify the title set forth in the abstract, and from what period.

ROLLS' COURT.—Feb. 21, 1837.

Cotham *v.* West.

Where a Trustee mixes the Trust-Fund, (which was a general Residue,) with his own Monies in his Banker's hands, and employs the mixed Fund in Trade, the Court will presume that the Advances were made out of the Trust-Fund; and where the Trustee employs the Trust-Fund in Trade, the cestui que trust *have the Option of either having the Profits of the Trade or compound Interest at the rate of £5 per cent. on the Monies so employed, with annual Rests.*

As to the Form of the Order giving Compound Interest.

Query, as to whether the Trustee who had so employed the general Residue in Trade, ought to be allowed, in discharge, what he actually paid to the Tenant for Life, and as to what Income the Tenant for Life was entitled to where the Testator gave no Direction as to investing the Residue? To decide that Question the Representatives of the Tenant for Life must be before the Court.

Lawrence Cotham, by his will, dated the 24th January, 1816, devised certain freehold and leasehold, and also all other his real and personal estates and effects, (except his household goods, &c.,) unto the defendants, James W. West and Stephen Sparrow, their heirs, executors, administrators, and assigns; and, subject to the payment of his debts and an annuity; the trustees were to pay and apply the rents, issues, and profits thereof, unto and for the use of his said wife and her assigns for life, if she should so long continue his widow, and, after her decease or marriage, then, in trust, for all and every his children, (except his eldest son,) their executors,

administrators, and assigns, as tenants in common, with equal benefit of survivorship in case any of them should die under age, and without leaving issue; and if there should happen to be but one such daughter, or younger son, then in trust for such one only daughter or son, his or her heirs, executors, administrators, and assigns.

The testator appointed James W. West and Stephen Sparrow, and his said wife, executors and guardians of his children.

The testator died in March, 1819, leaving his widow and William Penketh Cotham, an infant, his eldest son and heir at law, and Anna Maria Isabella Cotham, who had attained the age of 21 years, and the plaintiffs, Elizabeth Cotham and Mary Clara Cotham, infants.

The bill stated that, after payment of debts, the estate to a considerable amount got into the hands of Jas. W. West, and that he had employed the same from time to time in his trade of a brewer, by which he received interest at £5 per cent. independent of his profits as a brewer, and that the rents of the real estates were paid to W. Maria Cotham during her life; and, after her death, J. W. West received them, and employed them in his business.

W. Maria Cotham died on the 16th of July, 1829, intestate, and J. W. West obtained letters of administration, to be granted to him during the minority of the children.

That, after the death of W. Maria Cotham, J. W. West employed in each year the income or interest of the said testator's residuary estate, and the rents and profits of his real estate in carrying on his business, and the bill stated that the plaintiffs were entitled at their option either to the profits made by the said J. W. West, by his aforesaid employment of the said testator's estate, or to interest at the rate of £5 per cent. on the money so employed, the account of such monies and interest being taken with annual rests.

A case of *Cotham* v. *West*, nearly similar to the present, was decided by the Master of the Rolls, in which the same parties were engaged, and the Master of the Rolls, in giving judgment on the 15th of November, 1836, said, that Thomas West, who was a trustee for the plaintiff, and whose duty it was to keep an account of the rents, and to apply them for the benefit of the infant, permitted the defendant, his son, James West, to receive the rents and profits, paying to him interest at the rate of £3 per cent. with annual rests, and left him to do what he liked with the amount. In 1821, Jas. West entered into trade, and advanced money to the partnership in which he was engaged, and received £5 per cent. on the money advanced, with annual rests. He alleged that he had mixed up the trust money with his own monies, and out of the general mass in his banker's hands he advanced to the partnership, he admitted that he was bound to pay the interest which he had himself received. His Lordship observed that as it was a mixed fund, the Court would presume the advances were made out of the trust fund, even though it was admitted he had £2000 trust monies

in one year in his own hands, and the whole amount of advances to the concern did not exceed £500. And his Lordship thought the rules of the court did not prevent his making a distinction of that nature; therefore he was bound to pay £5 per cent. interest, with annual rests, on all the balances of the trust-monies which had been from time to time in his hands, and that he was personally answerable for any losses that might have occurred; the defendant to pay the costs up to the hearing, and the other costs to be reserved.

The minutes of this order having been drawn up were as follows:—

"And the said master, in taking the said accounts of the said rents and profits, is to make annual rests of the clear balance of such rents and profits in the hands of the said T. West, deceased, and the said defendant, J. W. West, respectively, and compute interest on such respective balances at the rate of £5 per cent. per annum."

This, it was contended, would not give compound interest, and an application was made to vary the minutes as follows:—

"And the said Master, in taking the said account of the said rents and profits, is to compute interest at the rate of £5 per cent. per annum on all sums of money received by or come to the hands of the said T. West, deceased, and the said defendant, J. W. West, respectively, and compute interest on such respective balances at the rate of £5 per cent. per annum from the time they respectively received the same during the time the same continued in their hands respectively; and in such computation the Master is to take annual rests."

The Master of the Rolls postponed his judgment in order to examine the papers in the cases of *Raphael* v. *Boehm* and *Gibbs* v. *Carpenter*.

The Master of the Rolls observed that he had read the cases of *Raphael* v. *Boehm* and *Gibbs* v. *Carpenter* with attention, and thought that where there was a direction to compute interest on the rests, it did not give compound interest, and the order must be so framed as to compute compound interest.

Mr. Piggott, for the plaintiffs in this case, contended, that, according to the case of *Cotham* v. *West*, (which we have just mentioned,) the plaintiffs were entitled either to have the profits derived by J. W. West in his trade, or to have interest at £5 per cent. on the money employed in the trade. He also contended, that, according to the case of *Dimes* v. *Scott*, 4 Russ. 195, the plaintiffs were entitled to an account of the income of the personal estate received by the tenant for life beyond what the tenant for life was entitled to, with interest thereon.

Mr. Tinney, for the defendant, contended, that this case differed

from *Dimes* v. *Scott*, insomuch as that there was no direction as to investment. Besides, that case was disapproved of by the profession. And he further contended, that, under the following clause in the testator's will, the defendant would be entitled to an allowance for his trouble in procuring £5 per cent. on the money. The words in the will were, "And it shall and may be lawful for them my said trustees and executors, by and out of the aforesaid trust estates, &c., to deduct and reimburse him, her, or themselves, all such loss, costs, charges, and expenses, as they should sustain, expend, or be put unto, *or shall reasonably deserve for his, her, or their trouble*, for or by reason of their acting in the execution of the several trusts herein contained."

The MASTER OF THE ROLLS, however, thought differently, and asked how this case could be distinguished from the other case of *Cotham* v. *West?*

Mr. Walker, (who was with Mr. Tinney,) said that, in the other case, the party had been receiving the income of £900, but in this case the balance was only £238. That the tenant for life lived ten years, and during all that time she received the income of the personal estate and all the rents, and was not dissatisfied, and that the defendant, since her death, had maintained and educated the three daughters and son out of the personal estate, the rents of the real estate being insufficient to maintain them.

The MASTER OF THE ROLLS said that the fact of the balance being small would count as nothing.

Mr. Tinney objected, because the personal representatives of W. Maria Cotham were not before the Court.

Mr. Piggott, in reply, said it was a breach of trust in the trustees to have employed any part of the *corpus* of these infants' fortunes in their maintenance. That J. W. West ought to be charged with the profits, and to be allowed in discharge so much as he properly paid to the tenant for life. That J. W. West took out administration during the minority of the children, and that, since the daughter had come of age, they had not made her a party, as they did not wish, (the property being small) to incur the expense of a supplemental suit for the purpose of stating that fact.

Mr. Kindersley and Mr. Kenyon Parker appeared for A. M. S. Cotham and the heir of the testator.

The MASTER OF THE ROLLS said, that the testator appointed James W. West and Stephen Sparrow executors, and Winifred Maria Cotham was tenant for life of the residuary real and personal estate. The will was proved, and the acting executor, James W. West, possessed himself of the estate, and mixed it with his own monies, and employed the mixed fund in trade. His Lordship said that there could not be a doubt but that the plaintiff was entitled to an account of the profits of the trade, or to be paid interest at the rate of £5 per cent.

The only question was, whether he ought to be charged during the life of the tenant for life, who was entitled to receive interest. There was no doubt that if there had been collusion between the executor and the tenant for life, the executor would have been equally liable; and whether the monies were so employed by collusion or not would make no difference to the persons entitled to the residue. It was said she received the large income, and that there was a surplus; but that could not be ascertained in the absence of the representatives of the tenant for life. His Lordship did not think that he was prepared at present to determine that the executor was liable to account to the residuary estate for the income received by the tenant for life.

And his Lordship decreed that there be a general account of the personal estate, and the balance due at the death of the tenant for life, and that the executors should be charged with interest at £5 per cent.; that the interest should be brought up, and charged with compound interest.

MARCH 8, 1837.

PALMER *v.* GRAVES.

A general Direction to pay Debts in a Will is a Charge by Implication, and may be controlled by a subsequent specific Charge.

In this case, (which was argued on the 6th,) a bill had been filed by Robert Palmer, on behalf of himself and all other the creditors of James Graves, for the purpose of establishing a charge on the testator's real estates The additional facts will be found in the judgment of the Master of the Rolls. It is to be observed that the will was executed before the late act of Parliament.

Mr. Bacon appeared for the plaintiffs, and cited *Clifford* v. *Lewis*, 6 Mad. 33, and attempted to distinguish the present case from *Braithwaite* v. *Britain*, 1 Keen, 206.

Mr. Chandless appeared for one of the devisees, and contended, that a charge by general words was not an absolute charge, and that it might be controlled by subsequent words, which the testator in the present case had done by the subsequent specific charge; and he cited the case of *Douce* v. *Lady Torrington*, 2 M. & K. 600.

Mr. Rogers appeared for another defendant.

The MASTER OF THE ROLLS, in giving judgment, said, that the question in this case was, whether a testator had by his will charged all his real estates with the payment of his debts?

The testator, James Graves, by his will, said,—"In the first place, I direct my just debts, funeral expenses, and the charges of proving my will, shall be paid." His Lordship observed, that this constituted a charge on the real estates; but it was not a clear express charge, but a charge by implication, capable of being explained by subsequent words. The testator afterwards employed other words; he proceeded to make several devises, and then he

said,—"I give and bequeath unto my son, James Graves, his executors, &c., my service of plate, tea-pot, sugar-bason, and cream-ewer, together with the rents and profits of my freehold and leasehold hereditaments and premises, due and accruing up to what is generally called a quarter-day which shall ensue after my decease, which rents and profits I charge with the payment of my said debts, funeral expenses, and the charges of proving this my will." The question was, whether the general charge was controlled by the subsequent specific charge? His Lordship was of opinion, that, according to the authorities of *Thomas* v. *Britnell*, 2 Ves. sen. 313, and *Douce* v. *Lady Torrington*, 2 M. & K. 600, a general charge by implication might be controlled by subsequent words, and that in this case the general clause was controlled by the subsequent specific charge; and his Lordship gave the plaintiffs a decree only for marshalling the assets.

VICE-CHANCELLOR'S COURT.—March 1, 1837.

Mirehouse *v.* Scaife.

The Words "it is my Will that my Debts and all the above Legacies be paid and discharged within six Months after my Decease," are not sufficient to charge the Testator's residuary real Estates with Payment of Debts and Legacies; but the Legatees are entitled to all the Benefit which the Law of Marshalling will give them.

In this case, which was argued some time back, Mr. Wigram and Mr. Walker appeared for the plaintiffs, and Mr. Knight, Mr. Jacob, and Mr. Booth appeared for the defendants.

The Vice-Chancellor, in giving judgment, said—In this case of *Mirehouse* v. *Scaife*, the bill was filed by two persons entitled to pecuniary legacies under the following will, which was dated the 21st of October, 1833. (His Honour observed that the date of the will was material in this case, and then read that part of the will by which various pecuniary legacies were given to several legatees, and whereby the testator disposed of a brig and of an estate called Gill-foot.) The testator then added, "It is my will that my debts and all the above legacies be paid and discharged within six months after my decease." The testator then said, as to all the rest and residue of his estate, real and personal, lands, messuages, and tenements, he gave unto Mary Newton, by her freely to be possessed at his decease; and he thereby constituted J. B. and R. S. to be executors of his will. The testator died; and it appeared one of the three legatees for £200 died in the testator's lifetime; and the bill was filed by J. Mirehouse, who was entitled to a legacy of £200, against the testator's heir at law, executors, and residuary devisee, stating the will of the testator, and that he left an heir, and that the executors proved the will and possessed themselves of the

personal estate; but that it was insufficient to pay all the testator's debts and legacies, and that the legacies had not been paid. It stated, that Newton and wife were residuary legatees, entitled in possession to the estate called Gillfoot; and it charged, that the personal estate was not sufficient for payment of the debts and legacies, and that the real estates devised to Mary Newton were far more than sufficient to pay the debts and legacies; and the bill sought that it might be declared, that, according to the true construction of the will, the debts and legacies were chargeable on the real estates of Mary Newton; and it sought for the performance of the trusts of the will, and that the deficiency of the personalty for payment of the legacies might be raised by sale or mortgage of the residuary real estates, or of a competent part thereof; or, if the Court should be of opinion that the real estates were not charged with legacies, then that the assets should be marshalled. This bill did not seek to charge with payment of debts and legacies the estates which were specifically devised, but only sought to charge the residuary estates, or, if not, then that the assets should be marshalled. To this bill a general demurrer was put in, but nothing turned on the form of the demurrer.

The first question was, whether the words in the will were sufficient to charge the residuary real estate?

It appeared to his Honour quite impossible to hold that the words could be extended to charge the real estates generally. It appeared to his Honour that those words did not constitute a charge on the real estates specifically devised. In a great number of cases the courts had shewn themselves anxious to lay hold of any words that would have the effect of preventing the debts of the testator from not being paid, and a laboured anxiety and technical *finesse* had been exercised for the purpose of giving meaning to words beyond their natural import; but it appeared to his Honour that it was impossible to construe this will by resorting to former cases of that kind in which decisions had been made, in favour of creditors, that certain words amounted to a charge of debts on real estate, because the law had received a material alteration before the testator made his will, viz., by the 3 & 4 W. 4, c. 104, the general object of which was to make liable for payment of debts the whole of a person's real estates of whatever character; and it was observable that the act has made liable to the payment of debts both copyhold and customary estates in the same manner as, under the former statutes, freeholds were made liable; that is, a priority not only was given to specialty debts, but they were made liable in the same manner as the freeholds. The effect was, that it was a legislative declaration that where there was no charge, there could not be equitable assets, but specialty creditors had a preference. If it was said that his Honour's attention ought to be paid to the technical rules laid down, it must also be said, that every body was supposed to know the law, and that the law which was the basis of

that interpretation was altered at the date of his will; and if the Court was to hold that those words constituted a charge on the residuary devised estates, his Honour should be saying that the testator, with a knowledge of that whereby all his estates would be liable to the payment of his debts in a manner in which specialty debts were preferred, had nevertheless charged his residuary estates so as to make them equitable assets, without any preference, meaning that the estates specifically devised should be treated as legal assets; that would be the mode of construction which would be whimsical, and would, in fact, be doing something unnecessary for him to do, because the law had provided sufficiently for payment of debts; and, since the passing of the act, without the words were clear, it would not be necessary to hold to the construction, which, but for the passing of the act, would not have been a charge; for it appeared to his Honour, what the testator had in contemplation was, not the charging of his debts on the real estates, but a speedy payment of debts; for he said it was his will that his debts and all the above legacies be paid and discharged within six months after his decease, and it had been justly remarked at the bar that it was quite ridiculous to apply it to all the legacies, because there was a specific legacy in the brig. His Honour's opinion, therefore, was, that those words did not constitute a charge on the residuary real estates.

The next question was, whether the assets should be marshalled? It appeared to his Honour that that point had been expressly decided, though it had not been much noticed. It was impossible to read the case of *Hanby* v. *Roberts*, reported in Ambler and in Dickins, without observing that Lord Hardwicke laid down the law in express terms. In the case as reported in Ambler, 127, Lord Hardwicke, after stating that assets should be marshalled in favour of legatees where specialty creditors exhaust, as against the heir, but not against a specific devisee, said—"But if one having land and personal estate makes his will, being indebted by specialty, and he gives specific legacies, and then gives the rest and residue of his real and personal estate; if creditors exhaust the personalty, the legatees may stand in their place, and come upon the residuary devisee, because he has only the rest and residue." His Honour observed, that the report was inaccurate as appeared in Dickens, where the words "specific legacies" were used. And in the same case, reported in 1 Dick. 104, under the name of *Hamby* v. *Fisher*, the reason was there expressed to be "because the residue is not given as a specific thing."

Well, then, in the case of *Powell* v. *Robins*, 7 Ves. 209, before Sir W. Grant, the bill was filed by the creditors. The specialty creditors had exhausted the personal estate. The simple contract creditors insisted that the testator's will charged the real estates with the payment of his debts; or, if not, that they had a right to stand in the place of the specialty creditors against the real

estates specifically devised. It was held not to be a charge, and the assets were directed to be marshalled. The Master of the Rolls, gave judgment.—His Honour then read that judgment, in which Sir W. Grant is made to say, "I take it to be a fact admitted, that the testator had no real estate but what is specifically devised to the son;" in another place, "I presume that the whole real estate was given to the son;" and again, "This proceeds upon the idea that there is no real estate but what is specifically devised to the son."

It was quite plain from the language which was used three times over in the most guarded manner, by Sir William Grant, that he would have marshalled the assets against the residuary devisee in favour of a legatee. And by the case of *Aldrick* v. *Cooper*, 8 Ves. 393, it was plain, that where a person had two funds to resort to, and another party but one, it would not be for the option of the former to go on that fund to which the other might alone resort, and which would exclude his right.

Supposing the matter was left in doubt in this case as to the accuracy of the rule laid down by Lord Hardwicke, it was set at rest by the judgment of Lord Manners in the case of *Spong* v. *Spong*, in the House of Lords, which was given with the concurrence of Lord Eldon and Lord Redesdale, in which it would appear, as it was stated in 3 Bligh, 104, a testator, after devising some particular real estates, and bequeathing some pecuniary legacies, used these words, "I do hereby expressly charge and make liable my real and personal estate to and with the payment of the aforesaid legacies;" and he then disposed of the residue of his real and personal estates to his son, Thomas Spong, absolutely, whom he appointed executor. There was some real property to pass under this residuary devise. Upon this will it was held, in the Exchequer, that both sorts of real estates were liable to the legacies, as well those which were specifically named, as that which passed under the residuary devise, upon the ground that there was no difference between a specific devise of a particular estate and a residuary devise of real estate. But Lord Manners, who delivered judgment, (with the concurrence of Lord Eldon, who was chancellor, and Lord Redesdale,) dissented from that position. His Lordship said, "I think there is a marked and obvious distinction between property specifically devised and real estate which passes under a residuary clause. His Lordship then went into the distinction, and added, "By the general rule, a specific devisee or legatee shall not contribute to make good a pecuniary legacy. But there could be no such rule applicable to a residue. A residue of real estate was so far specific that it must be in the possession or in the power of the testator to devise it at the time of making his will; and upon the lapse of any specific devise it would not fall into the residue; and this is its character. Lord Hardwicke, in the case of *Hanby* v. *Roberts*, recognizes that

distinction in the marshalling of assets; and it is a distinction which, as it appears to me, is very obvious and very decisive in this case. His Lordship then noticed an argument which the late lord chancellor, Sir Edward Sugden, had advanced." Mr. Sugden, in his argument, contended that, if the testator had, in the outset of his will, charged his debts and legacies upon his real estate, and had then given specific devises and specific bequests, and also pecuniary legacies, the pecuniary legatees would, in case the other funds were deficient, have a right to revert to property specifically disposed of. I do not concur in that opinion. It certainly was not the opinion of Lord Alvanley, who, in three different instances stated his opinion as to the distinction between creditors and legatees under such circumstances. In the first case of *Kightley* v. *Kightley*, Lord Alvanley made that distinction; afterwards, in *Shallcross* v. *Finden*, he persisted in it; in *Keeling* v. *Brown*, he continued to distinguish between creditors and legatees as to such a charge." His Honour then read the case of *Keeling* v. *Brown*, 5 Ves. 359, and observed that it would appear to throw some doubt on the point; but his Honour did not think that the precise point was present to the mind of Lord Alvanley. The question there was, whether under certain words the debts were charged on the real estates? It appeared that there was personal estate enough to pay all the debts, but no personal estate to pay the debts and legacies; and the question was, whether the assets should be marshalled for payment of the legacies? It did not appear in the argument that the case of *Hanby* v. *Roberts* was mentioned; and Lord Alvanley decided the case upon the ground that the words did not amount to a charge of the debts; but in the case he used this language.—(His Honour then read Lord Alvanley's judgment.) "Now, from the last sentence, one might imagine, that, from the plain meaning of the words that Lord Alvanley was using, that his opinion was against marshalling in favour of legatees, for he says, 'I cannot marshal the assets for payment of the legacies.'" But his Honour thought that was not what was meant, but what he meant was to express his opinion as to charging debts and legacies on the real estate, that some words would make a charge for debts and not for legacies; and it would appear, on looking at the cases of *Kightley* v. *Kightley* and *Shallcross* v. *Finden*, referred to by Lord Manners in giving judgment in *Spong* v. *Spong*, that that point Lord Manners supposed the Lord Chancellor was alluding to; for he read the three cases, and said afterwards, in the case of *Shallcross* v. *Finden*, as to the distinction between debts and legacies, and said, "I am still of the same opinion that I held in *Kightley* v. *Kightley*, though the Lord Chancellor, in *Williams* v. *Chitty*, doubted my distinction. I cannot agree that where there is a specific devise, there is no difference between debts and legacies," &c. &c. It appears what Lord Alvanley meant was to express his opinion as to the charge, but

not as to marshalling the estate, because the point was not before him. His Honour admitted that *Keeling* v. *Browne* was an express declaration that in such a case as the one before him, the Court would not marshal. It did not appear that his Lordship's opinion was called to Lord Hardwicke's decision in *Hanby* v. *Roberts*, which was decisive, express, and clear on the point. And even, notwithstanding Lord Alvanley's opinion, if his Honour found in the House of Lords a direct authority that the assets should be marshalled, and words to the same effect by Sir W. Grant in *Keeling* v. *Brown*, it would be sufficient to authorize his Honour to decide that, though the plaintiffs did not succeed in showing that the real estates should be charged, yet that they were entitled to have all that benefit out of the real estates which the law of marshalling could give them. The demurrer must, therefore, be overruled.

FEB. 11, 1837.

SPACKMAN *v.* TIMBRELL.

A Trader dying indebted by Specialty and Simple Contract, having devised and bequeathed Freeholds and Leaseholds to his Heir, who he appoints Executor, and the Heir settles those Estates on his Marriage, the Creditors cannot follow either the Freeholds or the Leaseholds, but the Devisee is personally liable for the Value of the Estates.

Where the Testator charges his Estates with the Payment of certain Legacies, and the Estates are settled, subject to the Legacies, the Creditors cannot claim those Legacies in discharge of their Debts.

Where a Bill by Creditors has been dismissed by Consent, without reserving a Right to appear in a Suit for the Administration of the Testator's Assets, and a Petition is presented for Leave to appear, and no Order is made on it, they will not be allowed their Costs of appearing in the Suit, nor will they have any Right to appeal.

In this case, which was reported ante, p. 171, the Vice-Chancellor decided, that the creditors of a testator, a trader, could not follow the real estates which he devised to his heir, and which were settled by the heir on his marriage.

The cause now coming on to be mentioned for the purpose of settling the minutes of the decree, two questions arose.

1st. Whether the creditors could follow the leaseholds bequeathed by the testator to Thomas Timbrell the elder, and by him settled with the freeholds? and,

2ndly. Whether the creditors were not entitled to the legacies of £3,000, given to the daughters of the testator, which were charged on the estates, and which were also charged in the settlement of Thomas Timbrell the elder?

Sir William Horne and Mr. Richards appeared for the creditors,

and contended that the creditors had a right to have the legacies applied in payment of their debts. That there was a reason for holding that the persons claiming under the settlement should have priority; because it was for a valuable consideration, but which would not apply to the legatees, who came in under the settlement without a consideration.

The VICE-CHANCELLOR said, that where the testator had devised the estate subject to the legacies, and those estates were settled subject to the legacies, the intention was, that the person taking under the settlement should take, charged with the legacies, and the rights of the legatees should remain unaffected by the creditors.

Mr. Morley, who appeared for the widow and children of Thomas Timbrell the elder, contended (on the other point) that the son did not take the leaseholds simply as executor, but also as legatee, which made the distinction from the cases.

The cases relating to the application of the testator's assets by executors for their own purposes, were fully gone into by Lord Eldon, in the case of *M'Leod* v. *Drummond*, 17 Ves. 152; and the case of *Nugent* v. *Gifford*, 1 Atk. 462, was an authority on this point. In that case, the executor was also residuary legatee, which fact did not appear in the report in Atk.; but it appeared in the observations of Lord Eldon, in the case of *M'Leod* v. *Drummond*.

Mr. Morley further observed, that a person dealing with an executor, without notice or collusion, must be protected.

And even admitting this argument not to be sufficient, he further contended that the creditors lying by for seven years after the settlement was made, which settlement was made three years after the death of the testator, they were barred by their neglect and laches; *Elliot* v. *Merriman*, 2 Atk. 41.

Mr. Richards observed, that the cases cited by Mr. Morley proved that, generally speaking, the executors had power to dispose of the testator's property; which would hold good against the creditors, because they had to pay debts; but could that argument apply to these leaseholds, as they were made the subject of the settlement? Besides that, there was no proof that the executor had assented to his own legacy.

The VICE-CHANCELLOR.—The marriage-settlement recited that Thomas Timbrell was seised of the manors, &c. for an estate in fee simple in possession, and therefore that there was a statement that he was absolute owner of the premises; and the leaseholds were described as part of the freeholds: the inference therefore was, that the leaseholds and the freeholds were both occupied by the same person, who was the person seised, which was a sufficient evidence of the assent.

Mr. Richards observed, that the creditors had a right to have

the personal estate, and that the parties had not paid a consideration which could be applied in payment of debts.

The VICE-CHANCELLOR did not see how he could decide against Mr. Morley. It appeared to his Honour, by the very terms by which the property was described in the settlement, that Timbrell was clearly in possession of the land, and that *primâ facie* there was an assent to the legacy, there being no notice of debts. (His Honour was satisfied of that.) It appeared that, after the death of the father, the son made a settlement for valuable consideration; so that it was within the principles laid down in the cases in which Lord Eldon commented on in the case of *M'Leod* v. *Drummond*.

Mr. Knight (who appeared for Spackman,) observed, that as the creditors had no right to appear, they ought not to have their costs. It had been agreed that the rights of the creditors should be supported in the master's office by Mr. Berkeley, who appeared for Mr. Reid, a trustee. There had been a special application made to the Court for the creditors to be allowed to appear; but no order was made on that petition.

Mr. Richards contended that the rights of the creditors could not be protected without attending before the Court; and if his Honour allowed them to appear, they ought to have their costs.

Mr. Knight observed, that they came in on their own responsibility.

The VICE-CHANCELLOR said he never made any order on the petition to appear.

Mr. Richards contended that there was no person before the Court to protect the interest of the creditors, and that probably they might be recommended to appeal. That Mr. Berkeley had only liberty to attend before the Master on behalf of the creditors.

The VICE-CHANCELLOR observed, that the ordinary rule was, that all the costs of representing the testator's estate were to be paid out of his residuary estate; but he did not admit, that under the terms and manner in which the creditors' suit was dismissed, that those persons, named as creditors, had any right to interfere in the present case; because his Honour remembered that it seemed to him that the bill had been dismissed by consent, and there was no understanding that any parties should be recognised as creditors in this suit. So that there was no ground for the application.

Mr. Richards said he believed they should have to appeal, especially as to that part of the decree in which the legatees were allowed to have the preference, and if his Honour was of opinion that they had no right to appear, they would be deprived of their right to appeal.

The VICE-CHANCELLOR said that if the decree dealt with the petition, why of course the petitioners had a right to appeal to the

Lord Chancellor to have the decree rectified. What his Honour meant was, that if the present order made on re-hearing, was an order on the face of it made on the creditors' petition, it followed that they might appeal to have the order amended. It was quite plain that any person who presented the petition might appeal to the Lord Chancellor. What his Honour meant was, that if the present order appeared to be made on petition of re-hearing, and on the creditors' petition, it would be competent to make the appeal.

FEB. 22, 1837.

DAWSON *v.* DAWSON.

Where a Testator gives a Person a Right of Pre-emption of an Estate, and says he shall "complete the Purchase" within a given Time, the Purchase-Money must be paid, and the Conveyance executed; otherwise he will lose his Right of Pre-emption.

Roger Dawson, by his will, dated the 30th of March, 1836, (after bequeathing certain pecuniary legacies,) said, "I give and devise unto and to the use of my sons, John Dawson and Joseph Dawson, and John Bazley White, of Kennington, aforesaid, Esq., their heirs and assigns, all that my freehold house and premises in High Street, in the borough of Southwark, now in the tenure or occupation of my said son Joseph, with the appurtenances, upon trust to permit my said son Joseph, at any time within three months after my decease, to become the purchaser of the same at or for the price or sum of £4000, and to sell and absolutely convey the same unto my said son Joseph, his heirs and assigns, or as he or they shall direct; but should my said son Joseph not complete such purchase within three months from my decease," then he directed his trustees, within twelve months after his decease, to sell the same by public auction or by private contract.

The testator died the 30th of April, 1836.

The plaintiff, within two months from the death of the testator, verbally communicated to his co-trustees his election and intention to purchase unconditionally, and without qualification, the hereditaments in High Street, at the price of £4000, and that his co-trustees assented thereto. The purchase was not completed by an actual conveyance of the hereditaments and payment of the purchase-money within three months from the death of the testator.

On the 19th of July, 1836 (being the last day of the three months from the testator's death), the plaintiff and his co-trustees delivered over to their solicitor, Mr. E. T. Clarkson, for the first time, the title-deeds and other papers and writings relating to the estate, with instructions to prepare a conveyance; and they for the first time delivered, within a week from the 19th of July, 1836, to Mr. Clarkson, the probate copy of the will.

The trustees were unwilling to act without the sanction of the Court.

The bill was filed by Joseph Dawson against the trustees and infant children of the testator, praying that he might be entitled to the benefit of the clause in the testator's will.

Mr. Knight, for the plaintiff, contended that, as he had accepted the purchase within the three months, it was sufficient, especially as the trustees considered him as a purchaser. In the case of *Wood* v. *Richards*, (which we believe is not reported,) and which was confirmed on appeal before the Lord Chancellor, the contract was not completed within the time; but the Vice-Chancellor, (although the valuation was not made within the time mentioned,) held that it was a good declaration of option; and Mr. Knight said that there was no difference between that case and the present, except as to the circumstance of the testator having used the words "complete such purchase," which words would make no difference. Mr. Knight then cited the case of *Lord Radnor* v. *Shafto*, 11 Ves. 448.

Mr. Collins, with Mr. Knight, contended, that, if the trustees had filed a bill against J. Dawson, they could have compelled him to complete his purchase, since he had agreed to accept the purchase, and that the testator did not require the money to be paid within the time. Therefore, J. Dawson could compel the trustees to allow him the benefit of the clause in the will.

Mr. Heathfield appeared for the infants.

Mr. G. Turner appeared for the trustees.

Mr. Messiter appeared for the other parties beneficially interested under the will.

The Vice-Chancellor, in giving judgment, said—The testator had said, "in trust to permit my said son Joseph, at any time within three months after my decease to become the purchaser" for £4000. True he had three months to become so; and to become a purchaser would *primâ facie* include the payment of the purchase-money and the taking of the conveyance. He might be a purchaser without; but was that the intention of the testator? for he says, "and to sell and absolutely convey the same unto my said son Joseph, his heirs or assigns, or as he or they shall direct; but should my said son Joseph not complete the purchase within three months from my decease." Here the testator pointed at some act which was to be the completion of the purchase. Sequestrating from the fund of Joseph the sum of £4000, or placing the money under the control of the trustees, would not get over the previous words. Could the purchase according to the words in the will be said to be completed when there was no conveyance?

His Honour could understand it to be so, provided you did not find in the will the words, "that should Joseph not complete the purchase, within the three months then the trustees were to sell the property by auction." His Honour must take the whole will

together. The testator described the terms upon which Joseph should become the purchaser. His Honour again repeated the words, and asked what other construction could be put upon them than that there should be a completion of the purchase within three months by a conveyance of the property.

ROLLS' COURT.—March 12, 1837.

Cooper *v.* Bowdler.

Where an Executor advances Money to a Legatee on the Security of his Legacy, and does not inform his Co-Executors, and there is a subsequent Mortgagee of such Legacy, who gives Notice to one of the Executors, which Executor informed his Co-Executors, the second Mortgagee will have the Priority.

As to the Stamp on the Mortgage of a Legacy.

The bill in this case had been filed by Cooper, who was an executor of Andrew Jones, against the defendant, Benjamin Bowdler.

John Bowdler, the brother of the defendant, by his will, gave to his nephew, Thomas Bowdler, the son of the defendant, Benjamin Bowdler, a legacy of £600, payable after the decease of Catherine Bowdler, his wife; and he appointed the defendant, Benjamin Bowdler, William Brayne, and his wife Catherine Bowdler, executors and executrix.

It appeared that Thomas Bowdler owed his father £2000, and he applied to him for a further loan, which the father agreed to advance on having the repayment secured on the legacy. Accordingly a power of attorney was executed by the son, authorizing his father to retain the legacy when it should become payable. Some time afterwards, Thomas Bowdler, being indebted to Andrew Jones, was applied to for payment of the debt, and threatened with proceedings, in consequence of which, Thomas Bowdler, by an indenture, assigned the legacy, together with other property at Shrewsbury, to Andrew Jones, for the purpose of securing the repayment of the debt.

It appears that the defendant, Benjamin Bowdler, did not inform his co-executors of the circumstance of his son having given him the power of attorney.

Thomas Bowdler, on assigning his legacy to Andrew Jones, requested him to give notice to Brayne alone, and not the other executors, as the knowledge of his being indebted might injure him with his aunt Catherine. How far this was done will appear in the judgment of the Master of the Rolls.

In 1829, Jones died, and appointed the plaintiff executor.

In 1832, Thomas Bowdler became a bankrupt.

Catherine Bowdler died in 1834.

The assignee of Thomas Bowdler put the legacy up for sale when notice was given to him of the assignment to Andrew Jones.

The other facts of the case will be found in the judgment of the Master of the Rolls.

Mr. Temple and Mr. T. H. Hall appeared for the plaintiff, and cited *Lepard* v. *Vernon*, 2 V. & B. 51, as to the power of attorney not being an appropriation.

Mr. Kindersley and Mr. Ombler appeared for the defendants, and Mr. Purvis for Mr. Brayne.

During the argument of the case, an objection was taken by Mr. Hall in respect of the stamp on the power of attorney, it being only a 30s. stamp, and therefore could not operate as a mortgage of the legacy.

Mr. Kindersley contended, that the assignment of a legacy did not require a stamp, as it was not provided for in the words of the Stamp Act, which said, "conveyance of any right, title, interest, or claim to any lands, tenements, rents, annuities, or other property, for or in respect of the deed whereby the land or other thing sold shall be conveyed to the purchaser;" and cited *Warren* v. *Howe*, 2 Bar. & Cres. 281, where the judges held, that the assignment of a judgment did not require an *ad valorem* stamp, and where it was held that the words *other property* applied to such property as is usually the subject of sale and may be converted into money. Besides that, as Benjamin Bowdler was an executor, it was unnecessary to have an assignment of the legacy, as he was to be considered in possession of it; and the power of attorney was only an authority to retain possession. This question the Master of the Rolls did not decide.

The Master of the Rolls stopped the reply, and, in giving judgment, said—It appeared that, in the year 1827, Thomas Bowdler was entitled to a legacy of £600, which was payable after the death of Catherine Bowdler, out of the estate of the testator; and the executors were Benjamin Bowdler, William Brayne, and his wife, Catherine Bowdler.

On the 1st of June, 1827, Thomas Bowdler, being entitled to the legacy, for valuable consideration, executed a power of attorney to his father, to enable him to receive the legacy when it should become due; and the circumstances under which it was given were stated in the evidence of Benjamin Bowdler himself, from which it appeared that, previously to giving the power of attorney, the son was indebted to his father to a considerable amount, and that the son applied to him for more money, which the father refused to give, unless the son gave a security for the money already advanced, as well as that which he should advance. This security was to be given on the legacy, but the legacy was not payable till the death of Catherine Bowdler. The son consented to do so, and gave directions to his clerk to prepare the power of attorney to receive the legacy, which he did, and it was

engrossed and executed in his presence. In the same month, the power of attorney was delivered to the father to receive the legacy, and he gave directions to borrow the money.

His Lordship (having read the evidence of W. Parker, the clerk, as to preparing the power of attorney,) observed that the father here, no doubt, as executor, knew, on receiving the power of attorney, of the fact, under which the legacy was to be received, that it would be paid to the son on the death of Catherine Bowdler.

As to notice of the assignment in such cases, the courts had, it appeared, held, in former cases, and his Lordship was of opinion in this case, that where there were several executors, and a transaction of this sort took place between the father and son, the father being one of the executors, and he keep the transaction to himself, without communicating with the other executors, (not that his Lordship supposed that the notice would not have been sufficient if this had been a common assignment,) and kept the secret within his own keeping, it would not be such a notice as to give effect to the transaction. The case of *Timson* v. *Ramsbottom* decided that doctrine, and especially the case of *Smith* v. *Smith* in the Exchequer, both cases not reported.

His Lordship continued.—Jones, in the other case, was seeking for payment of his debts previously due from Thomas Bowdler, and he required a security for the debt. That security Thomas Bowdler was willing to give: it consisted of a conveyance of certain estates and of an assignment of the legacy. That assignment was executed by Thomas Bowdler. Of the assignment, notice was given to Brayne, one of the executors. The indorsement on the deed was given as notice: it was entitled a "Copy Conveyance in trust to sell, and an Assignment of a Legacy." This was given to Brayne. T. Bowdler expressed a wish that no notice should be given to his father or to his aunt, Catherine Bowdler, as he thought his interest would be affected by such notice, as he had expectations from her. Knowles, the clerk of the solicitor who prepared the assignment, acted on these instructions; but Brayne acted contrary to the request, for he intimated to Knowles that he should shew the copy of the deed to the other executors, and that he would not keep it to himself; he then put it in his bureau. Mr. Brayne was sixty-seven years of age, and might not have remembered this transaction; but he said, in his evidence, that the paper writing was delivered to him; he had had the paper in his hands which he kept in his bureau; but, after receiving the writing, he informed Benjamin Bowdler. His Lordship observed that this was in confirmation of what Knowles had previously said Brayne would do. His Lordship, therefore, could not help considering that notice was given to Benjamin Bowdler by Brayne.

If Benjamin Bowdler had previously acted right, no question

could have arisen, and he could have reposed with safety on his own security, but it appeared that notice had been given to him of a good assignment.

His Lordship, therefore, was of opinion that the plaintiff had made out his right, and was entitled to have the legacy paid in satisfaction of his debt, and the costs to be paid out of the fund. His Lordship also observed that no reflection could be cast on Benjamin Bowdler; he had endeavoured to make his security as good as he could.

The assignee could not have his costs; but if there was any surplus after payment of the debts, he might.

Brayne was to have his costs.

Note.—It is to be observed, that the case referred to by Mr. Kindersley, viz. *Warren* v. *Howe*, cannot apply to this case, because there it was an assignment to a purchaser; here it is a mortgage; and the words used in the schedule to the Stamp Act, under the headings *Conveyance* and *Mortgage*, are different. The question, therefore, remains to be decided.

The case of *Warren* v. *Howe* is also reported in 3 D. & R. 494.

VICE-CHANCELLOR'S COURT.—March 17, 1837.

Clay *v.* Pennington.

Legacy to Infants paid to their Parents for their Advancement in the World, and for past and future Maintenance.

John Dixon, by his will, gave the residue of his personal estate and effects to trustees, in trust, after the decease of his daughter and granddaughter without leaving any issue, unto the children of his brother Benjamin, and their lawful issue in equal shares.

The daughter and granddaughter both died without leaving any issue.

The bill was filed for the purpose of having the decision of the Court as to who were the parties entitled under the word "issue," and at what period the bequest in favour of the issue of Benjamin Dixon took effect.

On the hearing of the cause, the Vice-Chancellor decided that the children of the testator's brother, and the lawful issue in every degree of each child who was living at the death of the survivor of the testator's daughter or granddaughter, were entitled to the clear residue of the testator's personal estate.

On this cause coming on for further directions, it appeared by the Master's report that there were thirty-five persons living at the death of the surviving tenant for life, who died without having left any issue.

Of the thirty-five persons entitled, several were infants; and on behalf of four of such infants a petition was presented, (which came on for hearing at the same time as the cause,) on the part of the parents, setting forth that one of the infants was a cadet in the Honorable East India Company's service, and in order that he might avail himself of the appointment it was absolutely necessary to provide for him the usual outfit and for his passage; that from the petitioner's circumstances it was impossible for him to supply the necessary pecuniary funds, and that the infant had not any property other than the legacy in question; and that the petitioner had incurred liabilities for the amount of the outfit; and that the share of the infant would not amount to £200.

That the three other infants were children of the petitioner, a widow, who was entitled to a pension of £50 per annum, and that her resources were wholly inadequate for the support of the petitioner and three infants; and that the infants had no other property than the legacy; and the petition then prayed that the share of the son might be paid to the petitioner, his father, for the expenses he had so incurred, and that out of the shares of the three other infants a sum of £50 might be paid to their mother for their maintenance, and £25 per annum might be raised and paid to her for their future maintenance and support.

The VICE-CHANCELLOR, on reading the affidavits in support of the petition, directed the payments to be made as prayed; and the minutes of the decree as regarded the other parties were agreed upon.

Mr. Wright and Mr. Turner for the plaintiffs and petitioners, and Mr. Teed and Mr. Haytor for the defendants.

Solicitors.—Messrs. Pocock, Messrs. Bridges and Mason, and Mr. W. T. Clarke.

Vide this case, ante, p. 165, called, by printer's mistake, *Clayton* v. *Pennington*.

MARCH 9, 10, & 16, 1837.

EVANS *v.* WILLIAMS.

Where a Testatrix recites in her Codicil that a Person to whom she has by her Will given an Estate for Life, Remainder to his Issue, was dead, without Issue; and then proceeds to devise the Estates to another, and it appeared that the Devisee had died, but had left Issue; query, do the Issue take?

A Devisee of a Reversion cannot file a Bill for Deeds without first establishing his Right at Law, which is to be done by Ejectment, and Admission of Possession by the adverse Party.

As to admitting parol Evidence in contradiction of a Will.

In this case the bill had been filed by the next friend of the female infant, against Mr. Thomas Williams, a solicitor, and the prayer of the bill was, that the defendant should be ordered to

deliver up certain deeds relating to the property in dispute and furnish copies thereof.

Mrs. Jones, by her will, gave all the rest and residue of her estates to Lewis Evans, for life, with remainder to his first and other sons in tail, remainder to his first and other daughters in tail, with an ultimate limitation to the testatrix's own right heirs.

The testatrix, subsequently, (in 1829,) made a codicil to her will, which recited that, by her said will, she had given the rest and residue of her estates to Lewis Evans, (the recital then went on to state the limitations in the will,) and it further stated that Lewis Evans had since departed this life, without leaving any issue; the testatrix, therefore, gave and devised all the rest and residue of her estates to the defendant Henry Evans, for life, remainder to his sons in tail, remainder to his daughters in tail.

It appeared that, at the date of the will, Lewis Evans was alive, and had one son, Lewis Evans the younger, an infant, who, together with his father, afterwards died, but before the testatrix executed her codicil; a posthumous daughter of Lewis Evans the elder, however, was born, who was the infant plaintiff.

The property in dispute had been let on building leases, reserving a rent, so that neither party was in possession, and neither party could distrain, because the deeds were in the possession of the defendant Williams, who had been the testator's solicitor, and were deposited with him by Sarah Owen, the testatrix's executrix, and he refused to give them up. The plaintiff, therefore, filed the bill against Mr. Williams, to obtain the deeds, for the purpose of establishing her right at law to the property, but as Henry Evans claimed adversely, he, H. Evans, was made a party to the suit, and Mr. Williams threw the defence upon him.

Mr. Knight and Mr. Parker, for the plaintiff, cited the following cases, beginning with Cicero de Oratore "Pater credens filium suum esse mortuum alterum instituit hæredem; filio domi redeunte, hujus institutionis vis est nulla." *Campbell* v. *French*, 3 Ves. 321; *Gordon* v. *Gordon*, 1 Mer. 141; *Kennell* v. *Abbott*, 4 Ves. 802; *Attorney-General* v. *Ward*, 3 Ves. 327; and *Attorney-General* v. *Lloyd*, 3 Atk. 351., 1 Vez. sen. 32., and Swinburne's Digest of the Civil Law.

The Vice-Chancellor said he could not well understand the case of *Attorney-General* v. *Lloyd;* it appeared to be very inaccurately reported.

Mr. Parker contended that there was no inconsistency in the will and codicil, and that the codicil did not revoke the will; but, on the contrary, it confirmed it; the effect, therefore, was, that the codicil merely introduced the limitations to Henry Evans, after the limitations to the heirs female of Lewis Evans, and before the right heirs of the testatrix; this would make the will and codicil consistent.

Mr. Jacob and Mr. Sutton Sharpe contended that the cases cited on the other side did not apply to real estates.

They contended that there was evidence to show that the testatrix knew that there was a child of Lewis Evans after the date of the codicil, viz., in 1830. This was proved by the evidence of Betty Martin, who brought the child to the testatrix, and said, "I have brought you your little heir;" and the testatrix told her servant, Jane George, of the circumstance, and said, "What impudence! she is no heir of mine."

They further observed, that the case of *Campbell* v. *French* applied only to personalty; and besides, in that case, the codicil was a mere nullity, because it revoked the bequest of the legacy in the will, on account of the children "being all dead," which circumstance would alone have been sufficient to revoke the legacy, without the codicil; and that in the case of *Kennell* v. *Abbott*, 4 Ves. 802, the misconduct of the husband prevailed in the mind of the Court, the husband having committed a fraud on the testatrix. And the Master of the Rolls, in *Kennell* v. *Abbott*, explained the meaning of the words in Swinburne's Digest of the Civil Law—"Falsam causam legato non obesse verius, quia ratio legandi legato non cohœret: sed plerumque doli exceptio locum habebit, si probetur alias legaturus non fuisse"—to mean a false reason given for the legacy, is not of itself sufficient to destroy it; but there must be an exception of any fraud practised.

They then cited *In the Goods of Richard Moresby*, 1 Hagg. Ecc. Rep. 378, to show that the ecclesiastical courts decide upon grounds on which no court of law or equity would decide. They then made some observations on *Attorney-General* v. *Lloyd*.

Mr. Jacob observed that he was sure that his Honour, with all his experience, had not known a case of this sort in which real estates were in dispute.

The Vice-Chancellor said that he recollected a case where a party recited that he intended to marry a wife, and devised an estate to her, and did not marry her, and his Honour held that she was entitled to the estates.

Mr. Jacob observed that there ought to be something amounting to a condition, and contended that the plaintiffs ought to have established their rights at law before they came into this court. Lord Redesdale, in his Treatise on Pleading, p. 54, said, "If the title to the possession of the deeds and writings of which the plaintiff prays possession, depends on the validity of his title to the property to which they relate, and he is not in possession of that property, and the evidence of his title to it is in his own power, or does not depend on the production of the deeds or writings of which he prays the delivery, he must establish his title to the property at law before he can come into a court of equity for delivery of the deeds and writings." The case of *Crow* v.

Tyrrell, 3 Mad. 179, also established the same principles; it decided that an heir at law cannot file a bill for possession of the estate and the title-deeds.

Mr. Sutton Sharpe was about to read the evidence, when

Mr. Knight objected to its being read. As the circumstance took place in 1830, and the codicil was dated in 1829, it would have the effect of making a new will for the testatrix.

The VICE-CHANCELLOR said that he must hear the evidence read to him before he could decide whether it was admissible or not.

Mr. Sutton Sharpe contended that the case of *Crow* v. *Tyrrell* was decisive that no person who was not legal owner could file a bill for possession of deeds, and that no case could be shewn where a party so situated had done so.

Mr. Richards appeared for Thomas Williams, the trustee, who, he said, claimed no interest, but refused to give up the deeds without the indemnity of the Court. Mr. Williams had been employed by the testatrix to make certain leases, by which means the deeds got into his possession, and he claimed his costs.

Mr. Knight, in reply, said that the case of *Attorney-General* v. *Lloyd* was a case where the property in dispute was real estate. In this case neither party was in possession, nor did it appear that they had received any rent; nobody but the tenant was in possession. The case of *Lady Shaftesbury* v. *Arrowsmith*, 4 Ves. 66, decided that where deeds were necessary for discussing the title, it was in the power of the Court to order their production. Nobody in this case could distrain without the deeds. The infant could not give receipts for the rent; and if she was successful in establishing her right, she would have to come into equity for a receiver. The case of *Crow* v. *Tyrrell* could not apply, because this was a reversion.

The part which had been cited on the other side, from Lord Redesdale's treatise, was in favour of the plaintiff, for it said, "if he is not in possession of that property, and the evidence of his title to it is in his own power, or does not depend on the production of the deeds or writings of which he prays the delivery, he must establish his title to the property at law," &c. In this case the evidence of the plaintiff's title was not in his power; he could not establish his right at law, because it was a reversion, which could only be done by distress for rent, and he could not distrain without the deeds which were in the hands of Williams; and the evidence did depend on the production of the deeds.

The VICE-CHANCELLOR, in giving judgment, said, as he understood the case, it was subject to this peculiar difficulty: the plaintiff asserted a title to the deeds, but was not in possession of the property, and his title to the property could not be made manifest without some proceedings at law, and no proceedings at law could be taken without the production of the deeds. His Honour did

[illegible] that, in some [illegible] a position as, [illegible] might be [illegible] necessary [illegible] appeared to [illegible] should take place, [illegible] might [illegible] direct [illegible] Court [illegible] doubt appeared [illegible] was in point [illegible] he would [illegible] whether the plaintiff [illegible] If the plan [illegible] possession, the [illegible] The question [illegible] the deeds, in order [illegible] should [illegible] agreed, that [illegible] and no [illegible]

[illegible]—March 11, 1837.

[illegible]

[illegible] *if the* [illegible] *the Legatee will be* [illegible]

[illegible] a legatee and his trustee, [illegible] the use of the legatee; [illegible] be refunded, on the [illegible] pay debts, &c.

[illegible] *distringas*

[illegible] presumed that the legacy, [illegible] vested absolutely in the [illegible] the only cases where the [illegible] were those where the executor [illegible] it was not known if outstanding [illegible] within the exceptions of the [illegible] *Williams* v. *Burton*, [illegible] v. *Kames*, 2

The LORD CHANCELLOR said that this case seemed to come within the exceptions, for the executor had been pressed by a *distringas;* but the defendants had a right to an inquiry as to assets.—Decree for an account and inquiry.

March 10, 1837.

HAWKINS *v.* PRING.

A Legacy assigned by an insolvent Debtor, for a valuable Consideration to his Mother, on the same Day that he makes his general Assignment under the Act, is good, provided the Legacy is not mentioned in the Schedule to the General Assignment.

This was a bill filed by a creditor claiming under the provisions of the statutes of 32 Geo. 2, c. 28; 26 Geo. 3, c. 4; and 33 Geo. 3, c. 5, a legacy of £300, which his debtor, (who had taken the benefit of those acts,) had made over to his mother, in consideration of a sum of £140, on the same day on which he executed the assignment of his property under the acts. In the schedule annexed to the assignment no specific mention was made of the legacy. There was no evidence of fraud or collusion.

The Solicitor-General, for the plaintiff, contended that the assignment to the mother was, on the face of it, fraudulent and collusive, as the acts vested all property in the creditors by the most extensive words. The plaintiff, at all events, was entitled, subject to any claim of the mother; and that, at least, it could only be considered as an assignment by way of security to the amount of £140.

The mother, in her answer, admitted the assignment.

Mr. Spence, for the defendants, contended that the act passed only what was contained in the schedule, and if it was incorrect, power was given to the creditor to get it amended, which it was his duty to have done. The assignee could have no better right than the assignor. The assignment was proved, but there was no evidence of there having been any fraud in this transaction. The contract could not be set aside at the instance of the assignor, and, therefore, *a fortiori*, could not be set aside at the instance of the creditor.

The LORD CHANCELLOR, in giving judgment, said that there was no evidence to shew that this was a fraudulent transaction, and he saw nothing to prevent the debtor from selling, assigning, or even giving away, the property, for he was only to assign what he had. There was no evidence but what arose from the facts. In the case of *Doe* v. *Edgar*, 2 Bing. N. C. 91, the chief justice considered that money or land, to pass under the assignment, must, in some way or other, be in the schedule.

The bill was dismissed as to the legacy of £300.

COURT OF REVIEW.—March 17, 1837.

Ex parte Fussell, *re* Bush.

Where an Attorney becomes a Bankrupt, his articled Clerk is entitled to such return of a proportionate Part of his Premium as the Commissioners shall think fit, and to have his Indentures cancelled.

This was a petition of an articled clerk of an attorney who had become bankrupt to have a proportionate return of his premium as an apprentice, under the 49th sec. of 6 Geo. 4, c. 16.

Sir G. Rose—My impression is, that the commissioners were right. The effect of the section is, that they shall return such part of the premium as they shall think just, regard being had to the time already served. The question is, whether it was the intention of the legislature that an articled clerk should be included under the word apprentice? My opinion is, that he was not; looking at the importance of the functions which the solicitor exercises, it can hardly be imagined that it was the intention of the legislature to omit a specific provision on so important a subject.

In the clause preceding this, where they make a law for the benefit of servants, they are not content with using the word "servants" only, but they say "servants" and "*clerks*." I think, therefore, that had they intended this to apply to clerks, they would have said "apprentices" and "clerks." It is necessary to advert to the preamble of the act, in which it is stated that it is the intention of the legislature to simplify the language. They say that where they use the word man they mean also woman, and so of others. The last section expressly stipulates that no alteration of practice shall be made, unless expressly provided for. The question is, what has been the practice? and whether the articled clerk is to be considered as a creditor under the bankrupt law? My opinion is, certainly not. It is not a proveable debt. But, as the act was to be construed beneficially for creditors, let us consider what was the state of the law and practice when the present act passed. By the case of *Ex parte Sandby*, 1 Atk. 149, it appears that search was made to find what was the practice. It was found that, before the time of Lord King, the apprentice was admitted as a creditor. The mode was, to refer it to the discretion of the creditors. The case before Lord Hardwicke was decided on the principle that the party was entitled to retain so much of the money as the creditors might allow. The practice is universal not to entertain the proof, but to refer it to the creditors. It was the intention of the act to substitute the discretion of the commissioners *quâ* commissioners for the practice. What would have been the course taken by the commissioners? They would not entertain the claim by way of proof, but refer it to the creditors. In this instance they would have sent it to the creditors. The

term "apprentice" being large enough to include articled clerks, my opinion is, that the petitioner is entitled to his prayer. The indentures ought to be cancelled, and the Commissioners should give him such compensation as may seem just to them, regard being had to the time already served.

Sir J. Cross.—The question is, whether the petitioner comes within the 49th section of the Bankrupt Act? It is objected, that he is not bound by the name of apprentice; that he is not an apprentice; and that his claim cannot be allowed. That this appears to be inconsistent with other provisions of the legislature; for, by the 3 W. 3, c. 11, such binding is deemed to be a good settlement. In the case of *The King* v. ——, Lord Kenyon said, "This relation can only be formed by using the word apprentice; the word clerk being used, he would not gain a settlement, because not bound *eo nomine*, which would be contrary to the principles of law, and absurd. As to the second objection, it is true that an attorney's clerk is not called an apprentice, but in these days things are often not called by their right names; we know that, in the newspapers, stealing is termed abstracting, and so of many other things; and thus it is that clerks are not called apprentices, though they were all formerly called so, and even those destined for the bar were called *apprenticii ad legem;* and the attorney's clerk is in fact an apprentice. The clause requires a liberal construction, and I think that this case comes clearly within the act. I cannot consent to keep this young man for three years longer in a service which offers no reasonable prospect of affording him proper instruction. The petitioner has a right to have his indentures considered as at an end, and to go before the Commissioners and have such allowance made him as they shall think reasonable.

Erskine, C. J.—At the first hearing I was of opinion that the petitioner had not brought his case within the statute, and the delay has not satisfied me that my opinion was wrong. The following are my reasons for differing from my learned brethren.

Acts of Parliament are promulgated, not only for judicial purposes, but for the regulation of the relations of life. If the object of the clause be in the nature of an exception, the judge is not to do more than he finds expressly declared therein. The leading purpose of the act is to secure an equal distribution to the creditors, and the object of the petitioner in this application is to obtain a preference. The 135th section declares that the act shall be construed beneficially for the creditors. *Dixon* v. *J. Baines*, 1 Barn. & Ad. 535.

The name apprentice is never adopted in the indentures by which clerks are articled to attornies, and this is one of the circumstances from which we may collect the intent of the legislature in the use of the word "apprentice." The stat. 2 G. 2, c. 23, the first statute passed for the regulation of attornies, is the first which

mentions this subject. In sec. 5, the word "*clerk*" is used, and not the word "apprentice." So in the 22nd Geo. 2, c. 46, (another act relating to attornies,) the term "clerk," (not "apprentice,") is used throughout. So, also, in the 1 & 2 G. 4, c. 48; 6 G. 4, c. 45 and 46; and also the 34 G. 3, c. 4, which is the act for granting stamp-duties on articles of clerkship. In the 8 Anne, c. 9, the terms clerk, apprentice, and servant are used as specifically and respectively applicable to profession, trade, and employment. I find no instance where the term apprentice is used for clerk, except in the Irish Stamp Act, 55 G. 3, c. 78, and c. 79. These two instances somewhat shook my opinion; but the English statute of the same session, c. 184, fortified the conclusion, that if the legislature had intended to apply the 49th section of the Bankrupt Act to articled clerks, it would have made use of the same terms as are there used under the head Apprenticeship. The object of the clause is to afford a more immediate remedy to the peculiar class of persons mentioned in the act. The apprentice has paid a premium for lodging, board, and instruction, and the sum, though of inconsiderable moment to the creditors, was of the greatest importance to the apprentice, who might be left in a destitute condition by the delay in distribution.

Attornies are not among the class of persons liable to be declared bankrupt, and even should they become so, they may afterwards pursue their professions and give instructions to their articled clerk. There are cases where persons may be bound as apprentices though their masters be not engaged in trade; such are surgeons, graziers, and farmers.

Upon the whole, I do not think that articled clerks are apprentices; and I find nothing from which I am able to collect that it was the intention of the legislature to include them under that term.

LORD CHANCELLOR'S COURT.—April 6, 1837.

Robson *v.* Ibbs.

A Testator, after giving vested and contingent Legacies, added "and if any Legatees should die before they can prosecute their Claim," *their Legacies to be divided "amongst the nearest Relations and next of Kin." Held, that the former Words meant, die before they are entitled to receive Payment, and that the latter Words meant next of Kin of the Legatees, and not of the Testator.*

The plaintiffs in this suit were the children and next of kin of James Miller, a legatee under the will of his father, Edward Miller, and the defendants were the executors of the said James

Miller, the surviving executor of the said Edward Miller, and the next of kin of the said Edward Miller.

The bill, which was filed in December, 1834, prayed that the rights and interests of the plaintiffs and defendants might be declared by the decree of the court, and stated, that Edward Miller, by will, dated 24th October, 1817, bequeathed to his wife Catherine, for life, "the interest of £2000 stock in the 5 per cent. Government Securities," and to his son Henry Miller the "sum of £350 stock in the 5 per cent. Government Securities, when he arrives at the full age of twenty-one years;" to his daughter Elizabeth Miller he gave "the sum of £300 stock in the 5 per cent. Government Securities, when she shall attain the full age of twenty-one years;" to his daughter Ann, the wife of John Jones, he gave "the sum of £300 stock in the 5 per cent. Government Securities, to be paid within six months after my decease." He also bequeathed to his two "grandsons, James and John Dowsett, the sum of £400 in the 5 per cent. Government Securities, share and share alike; this £400 stock to be transferred into the names of my said grandsons within six months after my decease; and the father, John Dowsett senior, shall receive the interest thereof till my said grandsons attain the age of twenty-one years; but when my said grandsons shall have attained twenty-one years each, *they shall be entitled to claim* the sum of £200 stock each." To his son James Miller the testator gave, "at the death of his wife Catherine Miller, the sum of £1000 stock in the 5 per cent. Government Securities," and bequeathed the residue to the said James Miller. To his son Henry, at the decease of his wife, he gave a further sum of £100 stock; to his daughter Elizabeth Miller a further sum of £100 at the decease of his wife; and also a further sum of £100 to his daughter Ann Jones at the decease of his wife; "which several sums of £100 and £300 shall be paid, under condition herein stated, within six months after the decease of my wife Catherine Miller." And then came the following clause, upon which the question arose:— "My will further is, that, if any person or persons whose names are inserted in this will, and are entitled to claim any property by virtue thereof, shall die *before they can prosecute their claim thereto*, the property so falling to the deceased person or persons shall be equally divided *amongst the nearest relations and next of kin*, share and share alike." The testator appointed his wife Catherine, his son James, and his brother in law Thomas Ibbs, executrix and executors, and died on the 6th of May, 1818. Henry Miller, Ann Jones, and Elizabeth Miller, (afterwards Nash,) attained twenty-one, and received their legacies accordingly. James Dowsett attained twenty-one; the other grandson, at the filing of the bill, was a minor. After payment of the debts and some of the legacies, the residue consisted, amongst other things, of £2800, 5 per cent. Bank Annuities, standing in the name of the testator at the time of his decease. £2000, part of this sum, was

appropriated by the executors to satisfy the dividends upon stock given to Catherine Miller. £400, further part of the £2800, was set apart to satisfy the like sum given to the grandsons. The sum of £400, residue of the said £2800, became the property of the residuary legatee, James Miller.

James Miller, the son, died in December, 1818. He bequeathed all his property to his wife for life, and, after her death, to his children equally, and appointed his wife, Rebecca Miller, (afterwards Robson,) and John and Thomas Dowsett, executrix and executors of his will, who duly proved the same. James Miller left a widow and three children him surviving. Catherine Miller died in April, 1833.

The Solicitor-General, on behalf of the plaintiffs, the children of James Miller claimed to be entitled to the £1000, part of the £2800 given by the testator to James Miller, and to the £700, surplus of the same fund after payment thereout of the £400 bequeathed to the two grandsons, and of the £300 to the three legatees of £100 each on the decease of Catherine Miller, and of the £400 residue to the executors of James Miller. The words "dying before he can prosecute his claim," must mean, before he is entitled to possession. If that view is correct, the next of kin of the legatee dying, and not of the testator himself, are entitled to the gift over under the words "the nearest relations and next of kin, share and share alike."

Mr. Tinney, for one of the next of kin of the testator, Edward Miller, agreed to the Solicitor-General's construction of the words "dying before, &c.;" but contended that the next of kin *of the testator* were intended by the words "nearest relations," &c. That these words must apply to all the legatees. How could the testator have meant the next of kin of infants to take their shares? The meaning at least was very doubtful, and in such a case the Court would favour the next of kin of the testator.

Mr. Treslove, for the executors of James Miller, said, that the words "dying before," &c., must be applied to those legatees alone who took contingent legacies, and ought not to have the effect of divesting a vested legacy.

The Lord Chancellor said he had no doubt as to the testator's meaning; that by the words "dying before he can prosecute his claim" he intended, dying before he was entitled to receive payment; and that the next of kin pointed out by the testator meant the next of kin of the legatee dying before he was entitled to payment. The words "the nearest relations and next of kin" must be referred to the last antecedent, which antecedent is the legatee. And it was very reasonable to suppose that the testator intended the family of the legatee should not suffer by his death. He therefore declared that the plaintiffs, as next of kin of James Miller, were entitled, under the will of Edward Miller, to the two sums of £1000 and £700.

FEB. 183.

JOMBART *v.* WOOLLETT.
JOMBART *v.* LEGG.

Where a Firm carrying on Business abroad enters into an Agreement with a Merchant in England to have a Credit by his accepting their Bills, and they accordingly draw, and remit him Bills, purchased by them and indorsed to him, to the full Amount of the Bills accepted by him, and he becomes a Bankrupt, having taken up only one of his Acceptances, and discounted and received all the Bills remitted, except two; held, that, unless there is a Custom established to the contrary, or a special Contract between the Parties, the Bills, to cover the Acceptances, ought to be kept till they are due; and that, as the Bills were remitted to meet Obligations which were never met, and there was no Contract, expressed or implied, to sell the Bills, the two Bills not discounted at the Date of the Bankruptcy belonged to the Firm, and not to the Assignees of the Bankrupt.

This was an appeal from the decision of the Vice-Chancellor, who decided, in December last, in favour of the plaintiffs, Jombart and Co. The bill had been filed by the plaintiffs, who were bankers carrying on business at Lisle in France, against the defendants, the assignees of Joseph Woollett, claiming the proceeds of two bills of £1000 and £50 respectively, which remained in the hands of Woollett at the time of his bankruptcy; and it prayed an injunction to restrain the negotiation of the bills or the distribution of the proceeds among the creditors of Woollett.

The case stated by the bill was, in effect, as follows:—

In the month of July, 1836, Jombart and Co. applied to Woollett to have a credit upon him by the acceptance of their bills, to which he assented, and in the interval between July and October, 1836, Jombart and Co. accordingly drew bills upon Woollett to the amount of £2000 and upwards, which he accepted; and to provide for the payment of those bills, they remitted bills purchased by them, and indorsed to Woollett to the full amount of the bills accepted by him, but becoming due at various dates between August and November, 1836, so that if Woollett had taken up his acceptances he would have been sometimes in advance upon the account current; but upon the 24th of October he stopped payment, and shortly after was made a bankrupt, having taken up only one of his acceptances to the amount of £56. He had discounted and received the proceeds of all the other bills remitted by Jombart and Co., except the two bills in question, which remained in his hands at the time of his insolvency, and upon his bankruptcy were handed over to, and the proceeds received by, his assignees. The bill set forth the correspondence by which the transaction was carried on, and from various expressions contained in the

etters, infere nces were drawn as to the intent of the parties, (as noticed in the judgment,) and an account was produced in the books of Woollett, by which it appeared that, in discharging the first of his acceptances which became due, he had applied a bill remitted by Jombart & Co., giving credit for the full amount of the bill, and entering the balance as due to his correspondents, Jombart & Co.

The question was argued upon a demurrer to the bill.

The Solicitor-General and Mr. Bligh appeared for the plaintiffs, and Mr. Wigram and Mr. Richards appeared for the defendants.

The Lord Chancellor, in giving judgment, after stating the facts of the case, said, the question upon this bill and demurrer appeared to be decided by the principles laid down in *Thompson* v. *Giles*, 2 B. & C. 422, and 3 D. & R. 733; *Exparte Pease*, 19 Ves. 25; *Exparte Smith: Exparte Freeman*, Buck. 237, unless there is a custom established to the contrary, or a special contract between the parties to a transaction of this nature, bills remitted to cover acceptances must, generally speaking, be kept till they are due; the right to sell must arise out of these circumstances. In this case we have no means of ascertaining the contract but from the correspondence. In the letter from Woollett to Jombart & Co., dated July 29th, 1836, the expression, "cover, us in due time," can only mean to put them in funds to meet the obligations when due. In a letter from Jombart to Woollett, dated August 8th, 1836, it is said, "we remit you 300*l.*, which we request you to carry to our credit;" if this bill had been immediately discounted, the proceeds would have exceeded the then actual engagements or approaching acceptances of Woollett. By the answer to this letter, on the 11th August, 1836, Woollett does not say that he has discounted, or proposes to discount, this bill; but his expression is, "it shall be carried to the credit of your account" and in the account it is so done for the full amount, leaving a balance due to Jombart & Co. In another letter, with respect to another bill remitted by Jombart & Co., Woollett says he will "do the needful, and pass it to the credit of Jombart's account, as soon as received." This same expression, "doing the needful," occurs in *Exparte Smith*, but it occurs without the important explanation here added, that it shall be passed to the credit of the remitter as soon as received." "Doing the needful" must here mean, that he will present for acceptance and payment when due, and cannot impart a right to sell immediately. In another letter, with respect to a third bill remitted from Jombart, Woollett says, he will pass it to their credit when due. These expressions, with respect to so many of the bills, seem conclusively to furnish the inference that there was no contract, express or implied, to sell or discount the bills, but that the intention was, that they should be kept till they arrived at maturity. And nothing less than contract, or custom equivalent to contract, can establish the title of the assignees and

displace that of the remitters. No custom appears, and the correspondence shews a contract adverse to the claim of the assignees; the bills are to be received when due, and the object of the transaction was to meet the engagements of Woollett, by the remittance of bills, not to establish a cash balance. Another objection to the claim, upon a question not distinctly raised, is, that the bills were remitted to meet obligations which never were met, and the condition, therefore, was not performed. With respect to the bills discounted, the proceeds of which were received by Woollett, it is unnecessary to make observation, since no question is raised as to those bills. But as to the two bills in question they were not discounted, and remained in specie, in the hands of Woollett, at the date of his insolvency. Upon all the authorities, and upon principle, they must belong to the plaintiffs, and the motion must be refused with costs.

VICE-CHANCELLOR'S COURT.—April 10, 1837.

Attorney-General *v.* Cradock.

To an Information and Bill filed for the general Administration of two Charities, and also impeaching a Transaction by which Part of the Charity Lands were exchanged, a Demurrer by one of the Defendants who had taken the Charity Lands in Exchange, was allowed on the Ground of Multifariousness.

Persons who have Property adjoining, and who dispute the Boundary, need not be made Parties.

This was an information for the purpose of setting aside an exchange which was made by Colonel Cradock and Archdeacon Hedlam, of land, of which they were joint owners, for certain charity lands of which the archdeacon was a trustee, and for a general administration of the charity. Colonel Cradock put in a demurrer for multifariousness, on the ground that he had no interest in the bill.

Mr. Knight, Mr. Jacob, and Mr. Bethell, appeared in support of the demurrer.

Mr. Wigram, Mr. Richards, and Mr. Smythe, for the bill, contended that, as Archdeacon Hedlam was a trustee of the charity, as well as a part-owner of the lands given in exchange to the charity, the whole transaction might be comprised in one suit.

There was another question as to parties: it appeared that the persons whose lands were adjacent disputed the boundary, and the charity property, the subject of the exchange, was part of the debateable land. It was contended that these persons must be made parties to the suit.

The Vice-Chancellor, in giving judgment, said, it appeared to

him that there was no objection as to parties, but that the bill was multifarious; the bill was a bill to administer the charity; not one charity, but two or more; it represented that there had been a general mismanagement of the estates, and it prayed that another trustee might be appointed in the place of a deceased trustee. It was in effect, therefore, for the purpose of a general administration of both these charities. The bill represented a transaction between Archdeacon Hedlam, one of the trustees of the charity, and Colonel Cradock, and that Colonel Cradock was claiming a certain portion of the charity estate, as owner; consequently, it appeared, that a question was raised as between Colonel Cradock and the charity, and that the contention must be determined by a separate suit in which he would be a defendant. His Honour said he could not distinguish this case from the case of *Salvidge* v. *Hyde*, 5 Mad. 133, and Jac. 151. The demurrer for multifariousness, must therefore be allowed.

MARCH 21.

FARRARD *v.* CLAY.

A Mortgagor cannot, on Motion, obtain an Injunction to prevent the Completion of a Sale made by a Mortgagee, under an absolute Power of Sale, on the ground that a Part of the Property was not mentioned in the Particulars of Sale, but only stated by the Auctioneer at the time of the Sale; the Mortgagee having waived his Right to object by sending an Agent to bid at the Sale, who did not, at the Time, protest against the Sale on the Ground of the Omission.

The Auctioneer may also refuse to receive the Biddings of the Mortgagor.

The plaintiff mortgaged lands to a mortgagee, who joined with the mortgagor in transferring them to the defendant Clay, to secure 4000*l.* In the indenture, by which the mortgage was transferred, was contained a declaration, empowering Clay to sell the premises, (after default,) by public or private sale, as the mortgagee should think fit, without the consent or concurrence of the plaintiff; and that such sales should be valid and effectual, though the plaintiff should not assent to the same.

The premises were afterwards charged with a further sum of 600*l.*

The bill alleged, that in July, 1836, the interest was considerably in arrear, and John Clay advertised the hereditaments to be sold by auction; on the 2d of August the plaintiff sent the full amount of interest due, which was refused, both the principal and interest being required.

Part of the property comprised in the indenture of mortgage consisted of a waterfall, or rent of 120*l.* per annum, payable for a right, granted by the plaintiff, of damming up part of the river Rock, one end of which adjoined the said lands. The premises

were put up for sale, by auction, at Rochdale, on the 3d of August last; the particulars or conditions of sale, which were not printed, omitted to specify the waterfall or rent.

At the auction, Lomax attended the sale as agent for the plaintiff, and bid up to 10,000*l.*; but the auctioneer, suspecting for whom he was bidding, refused to receive the bidding unless the agent declared by whom he was employed, which he refused to do and the property was ultimately sold for 10,100*l.*

It was not known that the waterfall was to be sold until it was mentioned by the auctioneer at the sale, and it was alleged that if it had been known beforehand many more persons would have attended the auction for the purpose of bidding.

The bill, which stated the facts before mentioned, charged, that the mortgaged premises were worth much more than 10,100*l.* The plaintiff had instructed Mr. Lomax to bid as high as 15,000*l.*, and that the auctioneer had fraudulently sold the estate to the purchaser at an underprice.

The bill was filed on the 10th of January, 1837, by Thomas Farrard, the mortgagor, against John Clay (the mortgagee), James Hampson, and Robert Walker, (the purchasers,) and Richard Sellers, the auctioneer, for the purpose of setting aside the sale, and for an injunction for preventing the completion of the purchase, and for a redemption and re-conveyance of the premises.

The present application was for an injunction according to the prayer of the bill.

Sir William Horne and Mr. Monro appeared for the plaintiff; Mr. Jacob and Mr. Kenyon Parker, for the mortgagee and the auctioneer; and Mr. Rogers, for the purchasers.

The Vice-Chancellor, after making some comments on the evidence of a surveyor as to the value of the property, observed, that after the mortgage, and considerable difficulty as to payment of the mortgage-money, and a further charge executed for securing the arrears of interest, several applications were made for payment of subsequent interest; promises were given and as often broken; it appeared that, at last, the mortgagee, did not hastily proceed to sell, but having repeatedly pressed the necessity of proceeding to a sale, on the 21st of June, the solicitor of the mortgagee sent to Farrard a letter, with a copy of the proposed advertisement for sale: this he allowed to remain unnoticed; and, in answer to this letter, no notice was taken of the advertisement. The plaintiff employed an agent to attend the sale, and endeavoured to purchase the property. The agent made no objection in respect of the waterfall. It appeared by the affidavit, no doubt, that Sellers, the auctioneer, informed the audience that it was his intention to sell the waterfall. If Lomax attended as agent of Farrard, and the property had been improperly sold, he ought to have protested against the sale; he, however, made no protest; he went on to bid; and the objection made at the sale,

did not proceed on the grounds that the waterfall and land were not included, but because his biddings were refused: it occurred to the auctioneer that the mortgagor's bidding would prejudice the sale; and that the mortgagee did not contemplate a sale to this person; and there was reason enough for this, because, if a person could not pay off the principal and interest of the mortgage, he could not buy the estate. It was an unfair thing for Farrard to interfere in the sale; but, however, the sale proceeded after there had been distinct information to all persons that it was the intention to sell the waterfall. It did not appear that there was evidence that the estate had been sold at an under-value. It was to be inferred from what was said in the affidavits, that there was a large attendance of persons who *bonâ fide* were bidders, and the fair value was given for the property; and, after the last bidding, there was a pause of twenty minutes before the auctioneer closed the bidding. The whole conduct of Farrard in this business was unfair, and Clay was treated most harshly. Whatever might come of the case at the hearing, it did not appear to be a case for interference by injunction. Clay and the purchasers might go on with the purchase, at their peril. Motion refused, with costs.

April 10, 1837.

Lawrence *v.* Mathews.

A Demurrer will hold to a Bill to perpetuate the Testimony of Witnesses, or to examine them de bene esse, *if Parties alleged to be interested in the Question at Law, but not on the Record at Law, are made Defendants to the Bill.* Semble, *that if there has been a Verdict at Law, and a Rule* Nisi *obtained, but no fresh Action commenced, it is also a good Ground of Demurrer.*

The question in this case arose on a general demurrer by three of the defendants, Carlile, Rashley, and Tremaine, to the plaintiff's bill.

The plaintiff by his bill claimed to be entitled to certain portions of tolls in respect of a tin mine in the duchy of Cornwall. The defendant, E. Carlile, as committee in right of W. Carlile, a lunatic, and the defendants, Rashley and Tremaine, claimed other portions. The plaintiff, whose right was disputed, commenced an action, in Hilary Term, 1836, in the Court of King's Bench, against James Mathews, an adventurer in the mine, and purser of the tolls, to establish his title. It was stated that the defendant, E. Carlile, (as W. Carlile's committee,) Rashley, and Tremaine, defended the action in the name of Mathews. The action was tried at Launceston, in August, 1836, and a verdict given for the plaintiff. It was further alleged that, on the 4th of November, 1836, Carlile, Rashley, and Tremaine, in the name of Mathews, obtained a rule to show cause why the verdict should not be set aside. Witnesses had been examined at the trial, to show what were the

stannary laws and customs of the duchy; and these persons were employed to divide the produce of the mines between those who were entitled.

The bill alleged that it was apprehended that a new trial would take place, that the witnesses who gave evidence at the former trial were aged, and that there was a risk of their dying before the new trial. The demurrer was filed on behalf of E. Carlile, Rashley, and Tremaine.

Mr. Jacob and Mr. Richards, for the demurrer, contended that it did not appear whether the bill was for the purpose of examining witnesses *de bene esse*, or to perpetuate their testimony. And they contended that, according to the case of *Angell* v. *Angell*, 1 Sim. & St. 83, and *Fenton* v. *Hughes*, 7 Ves. 287, the plaintiff could not file such a bill without showing that an action was pending, the former action being at an end; and the evidence given upon the trial might be used on a new trial, if the witnesses should die, by the notes of the judge or a shorthand-writer, or any one who could swear to the evidence given. It was also argued, that a court of equity would not give relief in cases where the parties to the bill in equity were not on the record at law.

Mr. Wigram and Mr. G. L. Russell, in support of the bill, contended that there was no necessity for commencing a fresh action, but that the former proceedings were still subsisting, and could not be considered at an end; and the only question was, whether you could file a bill to perpetuate the testimony of witnesses against persons who were not on the record at law?

The VICE-CHANCELLOR asked if any authority could be produced for that.

Mr. Russell said that *Glyn* v. *Soares*, 3 M. & K. and 1 Y. & C. was one, and also the case of *Few* v. *Guppy*. In some cases, persons having no interest might be made parties, as where the secretary of a corporation was made a party: and, in this case, no injury could accrue to the demurring parties, their costs being paid them.

During the argument, it was observed that the case of *Glyn* v. *Soares* was under appeal from the Exchequer to the House of Lords; and the Vice-Chancellor said, if that case applied, he should be wanting in respect to the House of Lords if he decided this case before the House had come to a determination; but having read the case, as reported in 1 Y. & C., his Honour came to the conclusion mentioned in the judgment.

At the conclusion of the argument, the VICE-CHANCELLOR observed, that an action could not have been brought by the plaintiff against Carlile, Rashley, and Tremaine; the action must have been brought against the adventurers, such as Mathews and others: now, by the permission of Mathews, they defended the action, in order to try their rights.

It was contended that Mathews had no interest in the action,

but that in fact Carlile, Rashley, and Tremaine, were the only persons interested.

Mathews was personally liable at law, and there was certainly a question between the plaintiff and Mathews, (that is to say) the adventurers. The persons claiming a share in the tolls, had no right whatever, except what they might establish against the adventurers. His Honour said that the pendency of the appeal, in the case of *Glyn* v. *Soares*, ought not to prevent his deciding this question; because in that case it was a mere feint to get Soares to receive bills as the queen's agent.

As his Honour understood this case, it was a person claiming a share of tolls, and his right was to be established against the adventurers; and so long as the adventurers raised the ores, so long they were subject to an action at law for recovery of the tolls. If the adventurers admitted who was entitled to the tolls, why then a bill might be filed by the persons claiming the tolls, to ascertain their rights. It did not appear that there was anything to prevent the plaintiff from bringing another action, which might be brought against Mathews or the other adventurers; the plaintiff had no right to file a bill for perpetuating the testimony of witnesses, or to examine them *de bene esse* against Carlile, Rashley, and Tremaine. In deciding this case, he said he did not intend to interfere with the case of *Glyn* v. *Soares*, now an appeal before the House of Lords. The demurrer must be allowed.

ROLLS' COURT.—April 2, 1837.

Hawkins *v.* Hall.

Where a Part of the Consideration for an Annuity was retained by the Trustee of the Grantee, who also acted as the Solicitor for the Grantor and Grantee, and by him applied in re-purchasing former Annuities, and in paying off a Debt due to himself, and the Costs of preparing the Annuity Deed; and this was not complained off till some time afterwards; the Annuity Deed is not thereby rendered void. If an Application to the Court of King's Bench has been refused, a Court of Equity cannot interfere with the Jurisdiction of that Court; but the Court of Equity possesses a Jurisdiction in those Questions independent of the Court of Law.

Query, as to the Grantor's Right to redeem? Query also, whether the Grantee is bound to keep up the Insurance on the Plaintiff's Life, where there is a Covenant to the effect that the Grantee shall assign the Policy to the Grantor on the Annuity being re-purchased?

The plaintiff was the grantor of an annuity, the defendant Hall was the grantee, and the defendant Bostock (who was out of

the jurisdiction of the Court,) was his trustee; the bill prayed, amongst other things, that it should be declared that the annuity was void under the Annuity Act: and if the Court should not be of that opinion, then liberty was asked to redeem.

The plaintiff, having become embarrassed, borrowed money of a person named Small, to whom he granted an annuity; he also borrowed money of Bostock, to whom he also granted an annuity; and being desirous of paying off these annuities, he applied to Bostock to raise the money necessary for that purpose. Bostock accordingly procured the defendant Hall to advance £3,500.

By an indenture, dated the 11th of August, 1825, which recited that the plaintiff was possessed of divers reversionary interests, derived from many different sources, the plaintiff assigned these interests to Bostock in trust, to secure to the defendant Hall an annuity of £442 : 5*s.* during the plaintiff's life. There was a covenant, on the part of the plaintiff, enabling Hall to insure the plaintiff's life in a sum not exceeding £5,000; and there was a proviso, empowering the plaintiff to re-purchase the annuity after five years, on giving three months' notice. The annuity was also secured by a warrant of attorney.

Shortly after the execution of this indenture, a memorial was enrolled in the Court of Chancery.

The bill insisted that this memorial was not sufficient, for the following reasons, viz.:—That the sum of £3,500, which was to be advanced in Bank of England notes, was not all paid to the plaintiff, or if paid to him, were returned to Bostock on the same day; and they were paid by one of Bostock's clerks into his banker's hands.

It appeared that an application had been made by the plaintiff to the Court of King's Bench for a rule to show cause why the annuity should not be set aside: a rule *nisi* was granted on this application, and a reference made to the master of that court, who made a report unfavourable to the plaintiff, and the rule was discharged.

The statement of the defendant on that occasion was supported by the affidavits of Hall, Younghusband, and Bostock.

The remaining facts of the case will be found in the judgment of the Master of the Rolls.

Mr. Kindersley and Mr. Renshaw, for the plaintiff, stated, that since the application to the Court of King's Bench, the plaintiff had got additional evidence; and they cited *Angell* v. *Hadden*, 2 Mer. 164; *Bromley* v. *Holland*, 5 Ves. 610, and 7 Ves. 3, and Cooper, Rep. 9, to show that a court of equity might interfere, though a court of law had decided the question; especially as they had got fresh evidence, and the application to the court of law had been supported by affidavit only; and they cited the cases *Gorton* v. *Champneys*, 1 Bing. 287; *Callow* v. *Porter*, 2 Bing. 370; *Henry* v. *Taylor*, 3 Bing. 177; to show that the courts would set aside

annuities, under the Annuity Act, where part of the money was retained or paid back.

The affidavits on the part of the defendant, stated that no money had been returned, and that the court of law had acted on that understanding, which was contrary to the real facts of the case, inasmuch as that part of the money had been returned, and applied in re-purchasing a prior annuity by the solicitor of the grantee, and the rest went to Bostock for costs, or some other purposes.

It was further contended, that the grantee ought to have insured the grantor's life, which would now belong to the grantor; and that the annuity had been granted at a greater rate of percentage than the usual rate, in order to enable the grantee to insure the grantor's life; and that the policy would now be of some value.

Mr. Pemberton, on the other side, cited *Birch* v. *Joy*, decided in the House of Lords last year, but not reported, for the purpose of showing that the plaintiff had no right to redeem; and also *Cane* v. *Lovelace*, 2 Bar. & Ad. 767; *Barber* v. *Garmon*, 4 Bar. & Ald. 281; and the case of *Philips* v. *Crawfurd*, 9 Ves. 214, and 13 Ves. 475, as to returning the consideration-money not invalidating the annuity. And as to the insurance, he contended, that if the grantee of an annuity did not insure the grantor's life, he became himself the insurer; and that there was no covenant which compelled him to insure.

Mr. Girdlestone, for one of the defendants, contended that the bill did not allege a refusal on the part of the defendant to permit the re-purchase; consequently they were not entitled to a decree to that effect.

The Master of the Rolls, in giving judgment, said, that the bill prayed that an annuity secured by an indenture, dated August, 1825, might be declared fraudulent and void; and in case it should not be declared void, then that the plaintiff should be entitled to re-purchase the annuity, on payment of £3,500, and the arrears in respect of the annuity. The facts of the case were as follows:—Bostock (who was a solicitor,) was employed by Hall, the defendant;—he could not be considered as employed generally, but several transactions had taken place between them, previously to the annuity being granted. Hawkins had granted an annuity to Bostock; and a considerable time before August, 1825, Hawkins applied to Bostock to raise money; several applications were made, and several conferences took place on the subject; but in the meantime, Hawkins was pressed for money, and Bostock advanced him £740, in bills or notes, on the understanding that he should be paid out of the money to be procured. By a deed, dated the 11th of August, 1825, the plaintiff granted an annuity of £442: 5*s*. to Hall in consideration of his advancing £3,500. The deed was executed, and the £3,500 paid, and the receipt indorsed

on it. This transaction was not complained of from 1825 till 1831. By the evidence, it would appear that the £3,500 was paid in Bank of England notes to Hawkins, and the same sum was on the same day repaid by the same notes, and were shortly afterwards found standing in the name of Bostock at his bankers. In 1831, a complaint was made to the Court of King's Bench; the plaintiff made an affidavit, in which he stated that, on the 11th of August, 1825, he signed a deed purporting to be the grant to Hall, to secure an annuity of £442 : 5*s.* during the life of deponent, and that the consideration was £3,500; that on the same 11th of August, Bostock paid to the deponent £375 : 5*s.* 1*d.*, and retained the remainder of the £3,500, and gave the deponent the following account. His lordship then read the account stated in the affidavit, by which it appeared that Bostock applied the remainder of the money in repurchasing Small's annuity, his own annuity, and the money which he had advanced, and £140 for the costs of preparing the annuity-deed of August, 1825; and that all these sums amounted to the £3,500 advanced.

This affidavit was answered by the affidavit of Bostock, who swore, that the £3,500 was paid to the plaintiff, and that no part of it was retained by him. Younghusband and Griffiths, Bostock's clerks, swear, that the money was paid; but the allegations of the several deponents are not quite consistent. The affidavit of Bostock appears to be evasive. It may, so far as it goes, be consistent with truth, for he swears that no money was retained, that the whole was paid to Hawkins, which was quite consistent with its being first paid and afterwards returned. On these affidavits it was referred to the Master of the Court of King's Bench, and upon the report and the information thereby obtained the Court of King's Bench was induced to discharge the rule obtained by Hawkins. Unfortunately the report has been lost; there is, therefore, no information before me by which I can know what were the facts produced before the Master, and what the real state of the circumstances on which the Court acted; but there appears to have been a regular application to the Court, and a regular investigation, and a judgment of the Court. An important question is raised on the present case, whether these proceedings ought not to be considered as binding on the plaintiff? He did not file his bill for a long time after the rule was discharged. The jurisdiction of the Court of King's Bench is given by the Annuity Act. By the 6th section it is provided, that if the consideration, or any part thereof, shall be returned to the grantee, it shall be lawful for the grantor to apply to the Court in which any action shall be brought, for payment of the annuity, or judgment entered up, by motion to stay proceedings on the action; and if it shall appear to the Court that such practices, as aforesaid, have been used, it shall be lawful for the Court to order every

deed, &c., to be cancelled and the judgment vacated. Now this section made the Court of King's Bench a court of competent jurisdiction to determine the question; and, consequently, in the absence of any thing to the contrary, I am bound to conclude that the application to the Court of King's Bench has been treated according to the rules of that court. It is, however, a very important question, whether the Court will entertain an application after the matter has been decided by a court of law. It certainly appears that the Court did not, in the case of *Angell* v. *Hadden*, 2 Mer. 164, entertain such an application; but that case depended upon other circumstances independent of the present question. In *Bromley* v. *Holland*, an application had been made to the Court of King's Bench, on certain specified grounds; that application was refused on the merits. The application was renewed, alleging the facts previously alleged, and other additional facts, upon which the Court might act, but the Court of King's Bench refused to interfere, because there had been a decision upon the question. After this refusal, relief was sought, and the case came before Lord Alvanley, who decided, that the objection was purely a legal objection, and that there were no grounds for equitable relief. From this decision there was an appeal to Lord Eldon, who very carefully considered this matter, as appears from the judgment. Lord Eldon commenced, by observing, that the practice of lending money on annuity was pernicious, and on that view he founded his decision. He did not decide on the circumstances which were considered by the courts of common law, and it may be collected from what he said, that though there were so many grounds for setting aside the annuity, yet he refused to give relief, because the Court of King's Bench, having considered the matter, had refused to set the annuity aside. That was the state of the case which led me to suppose that he thought that the proceedings in the Court of King's Bench would not prevent the jurisdiction in this court, since that Court could not give all the relief required, as he considered that the act did not give the courts of law authority to order that the securities should be delivered up. It seems, therefore, that courts of equity possess a jurisdiction independent of the courts of law. It was argued, in this case, as there was no correct account of the proceedings in the Court of King's Bench, that their decision could not be considered as an authority. On the other hand, it was argued, that the proceedings in the Court of King's Bench ought to be considered as conclusive, and that where there was no allegation of fact to the contrary, there ought to be a presumption that the proceedings were properly conducted. The Court, however, would not act without being satisfied that some injustice had occurred, which cou d not be known in the absence of the knowledge of the facts r o ɪved before the Master, and on what ground the report was

made, and in the absence of any averment of fact. The affidavits were very unsatisfactory and contradictory. (His Lordship then observed upon the affidavits relating to the time of signing of the annuity-deed.)

The case then comes to be decided on its merits, independently of the cases.

The jurisdiction of the Court of King's Bench, under the clause in the act, may be considered not to exclude the jurisdiction of this court. His Lordship continued.—It is not merely the circumstance of money being paid and afterwards returned, which would render the security void, but the purchase-money must be returned under some fraudulent pretence; not returned *bonâ fide* for the purpose of replacing monies *bonâ fide* paid by the grantee to the grantor, or on his account and by his direction. It appears that the £3,500 was disposed of by Bostock, purely for the benefit of the plaintiff; and as to the £140 retained to pay the bill of costs, part of it had been applied in payment of stamps, leaving £89 for Bostock's trouble, which was a large sum; but considering the necessary length of the recitals, and the nature of the property, which was made the subject of the security, there must have been more than the ordinary amount of trouble. The question then, is, whether such return was made under any fraudulent pretence? I am of opinion that it was not, and considering, that the plaintiff delayed making any complaint for a long period, and considering the merits of the case independent of what took place in the Court of King's Bench, I am of opinion that the annuity is not void. As to the plaintiff's right to redeem I had some doubts. It was said that the case of *Joy* v. *Birch* was an authority on that point; I will look into the papers in that case and give judgment on that point at a future period. If the plaintiff has a right to redeem, another question will be, whether the grantee was bound to keep up the insurance on the plaintiff's life. He was to appear at an insurance office, for the purpose of effecting an insurance, which was done; but the insurance was not kept up, and the deed contained a covenant to the effect, that when the annuity was redeemed, Hall should assign the benefit of the policy to the plaintiff. It was contended, on one hand, that Hall was to effect the policy for his own benefit; on the other hand it was contended that there was an implied covenant to insure. This being the state of the case, I shall postpone my judgment as to this and the other point.

VICE-CHANCELLOR'S COURT.—April 15.

Exparte Watkins.

A Solicitor who had not taken out his Certificate, attending the House of Lords on the Hearing of an Appeal, as Substitute for the Appellant's Agent, is privileged from Arrest. By a slight Deviation and Stoppage for Refreshment, he does not forfeit his Privilege. The Arrest having been made upon an Attachment of the Court of Chancery, that Court has Jurisdiction to order his Discharge from Custody.

This was a motion for the purpose of having Mr. Watkins discharged from the custody of the warden of the Fleet Prison. Mr. Watkins, who was a solicitor, but had not taken out his certificate, had been attending the House of Lords from ten o'clock in the morning till half-past four in the afternoon, as the agent conducting an Irish appeal on behalf of a solicitor, to whom he had sold his business. On his return from the House he had been arrested at a public-house in Piccadilly, while taking refreshment, on his way to Kensington, where he resided.

Mr. Bethell took the following objections:—1st. That relief could only be obtained in the House of Lords.—*List's Case*, 2 V. & B., 373. 2dly. That Watkins could not properly act as an agent without a certificate; and 3dly. That his name was not indorsed on the back of the papers, but that the name of his employer was. That he had deviated from the direct road, and had stopped longer than necessary on the road.

Mr. Cooper, on behalf of Watkins, contended that it was the privilege of the client, and not of the solicitor, consequently that the certificate was of no consequence. Scotch agents, who were privileged, were not solicitors; there was no parliamentary order requiring them to be such, though there was an order of the House of Commons requiring those who attended committees to be solicitors. And he cited the following cases:—*Exparte Temple*, 2 V. & B. 391; *Meakins* v. *Smith*, 1 H. Black. 636; *Randall* v. *Gurney*, 1 Chit. 679; S. C. 3 B. & Ald. 552; *Walker* v. *Webb*, 3 Anst. 941; *Selby* v. *Hills*, 8 Bing. 166, & 1 Dowl. P. C. 257.

The Vice-Chancellor said, that he was of opinion that the judge in this court had jurisdiction, and that Watkins had a right to attend the House of Lords on behalf of the person to whom he had sold his business. The only question was, whether there was an unwarranted deviation from the road on his return from the House of Lords; it was not necessary that he should return by the nearest road; he went by Piccadilly instead of by the park, and met and talked to persons on his way; at last he went into a public-house in Piccadilly; the officer's affidavit did not state how long he remained there; he had been attending early at the House of Lords, and required sustenance. Supposing a witness

came from Scotland, was he obliged to remain on the coach the whole way, and not get out for refreshment? He must be discharged, but without costs.

LORD CHANCELLOR'S COURT.—Feb. 8, & April 14, 1837.

Bullin *v.* Fletcher.

A Testator having contracted for the Conveyance of an Estate to Himself, "his Heirs, Appointees, and Assigns," recited the Contract in his Will, and then devised the Estate to Trustees in Trust to sell; afterwards he took a Conveyance of the legal Estate to himself and a Trustee, to the ordinary Uses, to bar Dower: Held to be a Revocation of the Will, and that the Trustees could not compel a Purchaser to accept the Title.

This was an appeal from a decree of the Master of the Rolls; and the bill prayed a specific performance of a contract. The testator, in this case, having contracted for the purchase of an estate, to be conveyed to himself, "his heirs, appointees, and assigns," made his will, reciting the contract; and then devised the estate to trustees in trust to sell. The testator, after the date of his will, took a conveyance to himself and a trustee, to the ordinary uses, to bar dower.

Upon the testator's death, the trustees having sold the estate, the purchaser took an objection to the title, on the ground that the testator's will had been revoked by the conveyance; whereupon the bill was filed.

The case was heard before the Master of the Rolls; and he being of opinion that it was a revocation, dismissed the bill. From this decision the trustees appealed to the Lord Chancellor.

Mr. Spence and Mr. Koe appeared for the trustees, and argued that the conveyance was made in accordance with the agreement for sale; and they cited *Brain* v. *Brain*, 6 Mad. 221, which they contended overruled Sir John Leach's former decision in *Ward* v. *Moore;* they also referred to the opinion of Sir E. Sugden, in his book on Vendors and Purchasers, 178.

Mr. Wigram and Mr. Turner, on behalf of the purchaser, contended, that if the testator took a modified estate by the conveyance, it operated as a revocation of his will; that, in this case, the conveyance was to a trustee, who took the legal estate; and the testator had an object in that particular mode of conveyance, (viz.) to bar dower, and they cited the following cases—*Rawling* v. *Burgess*, 2 V. & B. 382; *Williams* v. *Owens*, 2 Ves. jun. 599; *Brydges* v. *Duchess of Chandos*, 2 Ves. jun. 417; *Harmood* v. *Oglander*, 6 Ves. 199, 8 Ves. 106; *Ward* v. *Moore*, 4 Mad. 368;

Tickner v. *Tickner*, 3 Atk. 742, and 2 Ves. jun. 601; *Maundrell* v. *Maundrell*, 10 Ves. 256; *Luther* v. *Kidby*, 3 P. W. 170.

Mr. Cole appeared for other parties.

APRIL 14, 1837.

The LORD CHANCELLOR.—The question in this case arose on a bill for the specific performance of an agreement; it was not, therefore, strictly speaking, an adverse claim between the parties. The only question is, whether the title was such as a purchaser is bound to accept. It appears that a contract was entered into by the testator for a conveyance of the fee simple to him, "his heirs, appointees, and assigns, free from all incumbrances, with the usual and proper covenants." After this contract was entered into, the purchaser had an equitable title in the property, He made his will after the date of the contract, in which he recited that he had contracted for the purchase of the lands, and devised them to certain persons, in trust, to make sale of the same. On the 11th of April, 1833, the premises were conveyed to the purchaser and a trustee, for the purpose of barring dower: the case, therefore, came to this—there was a contract which gave the beneficial interest in the property, and that benefit was devised, and afterwards the testator took a conveyance to himself and a trustee, to bar dower. The question is, whether this did or did not operate as a revocation of the devise? It was argued, that if the trustees could only contract for the equitable interest, then that they should be ordered to procure a conveyance by the proper parties of the legal estate. Upon this, the question arose, whether the mode of conveyance operated as a revocation of the will, or that there was such a reasonable doubt that the purchaser ought not to be compelled to take the title? The first case which the Master of the Rolls seems to have relied upon, was that of *Rawlins* v. *Burgess*, 2 V. & B. 382, which decided that the testator having made a contract for the purchase of an estate in fee simple, with the usual agreement for title and conveyance, and making a will by which he devises the equitable fee under the contract; if, afterwards, he takes a conveyance to a trustee and his heirs, to hold subject to the appointment of the devisor, with various subsequent limitations of trust, taking thereby a modified estate, and not the absolute legal fee according to the contract, beyond all doubt, the will would have been revoked.

But it was said that, in that case, it was not a part of the contract that he should have a conveyance made to him, "his heirs, appointees, and assigns:" and that, by these words, he had reserved to himself the power to direct the estates to be conveyed to himself and the trustee in the manner in which it had been done; but here the real question is, whether taking the conveyance of the legal estate to himself and the trustee, had the effect of doing something which he had the power of compelling the vendor to do, or whether he had not done something to answer his own particular

purposes? Whether the authorities on the subject are right or not, is not for me to consider; and I have the satisfaction of being able to say, that it is the intention of the legislature to relieve the Court from dealing in future with questions of this kind; but, in the meantime, I must decide according to the authorities as they now stand, whether such a title can be forced upon a purchaser. In the case of *Parsons* v. *Freeman*, 3 Atk. 742, Lord Hardwicke meant to say, that if, by the conveyance, the estate was not conveyed according to the contract, but otherwise modified, it would be a revocation; and in this case the estate was modified by the subsequent conveyance. In the case of *Tickner* v. *Tickner*, referred to by Lord Hardwicke, in *Parsons* v. *Freeman*, Robert Tickner, being possessed of an undivided moiety in lands of gavelkind, devised them to his wife and her heirs. He afterwards made a partition, a fine was levied, and the moiety of the testator was limited to such uses as he should appoint; and in default of such appointment to him in fee, it was held to be a revocation. Here was a decision, that where, after the date of the will, the testator takes a different estate, it was a revocation. In this case, the testator thought proper to receive a conveyance to uses, to bar dower, instead of the fee. Until that case of *Tickner* v. *Tickner* was decided by Lord Chief Justice Lee, the question had never been raised. *Rawlins* v. *Burgess* was a case directly in point, except that the words "appointees and assigns" were not used in the contract; but that would not make any difference, because, under those words, the purchaser would not have the power of compelling the vendor to convey to uses to bar dower. In *Ward* v. *Moore*, 4 Mad. 368, Sir J. Leach had decided that a conveyance to the ordinary uses, to bar dower, was a revocation. He said, "If the owner of an unqualified equitable fee devise it by his will, and afterwards take a conveyance of the unqualified legal fee, this is no revocation of the will; because the conveyance was incident to the equitable fee: here the subsequent conveyance was not such as was incident to the unqualified equitable fee, but made an alteration in the quality of the estate, and was therefore a revocation."

The only case referred to, at all impeaching these decisions, is the case of *Brain* v. *Brain*, 6 Mad. 221; that was a case of a mortgage, which of itself did not operate wholly as a revocation, and that was the ground upon which Sir John Leach, who before decided *Ward* v. *Moore*, decided that case. The intention was simply to create a charge, and there was no re-conveyance by the trustees. It was said that that case was inconsistent with the former decision of *Ward* v. *Moore;* but the case was decided on the ground that a simple charge would not revoke the will. In the case of *Kenyon* v. *Sutton*, in 2 Ves. jun. 601, referred to by Lord Alvanley, where the testator conveyed the estate in trust, to pay debts, and declared the uses, after payment of his debts, to such uses and purposes as he by deed or will should appoint; and in

default of appointment, to himself in fee; he held it to be a revocation, because he had not the same estate.

His lordship concluded by observing that there was a direct concurrence of authorities, that what had been done in this case would amount to a revocation of the will; and against all these authorities, he could not decree the party to take such a title. He was bound to say that the judgment of the Master of the Rolls was right; and being an appeal against all the authorities, he must dismiss it with costs.

MARCH 11, 1837.

VIGORS *v.* LORD AUDLEY.

A Demurrer will not hold to a Bill filed by some of the Shareholders of a Mining Company against the Directors of the same Company, on the Ground that the rest of the Shareholders are not made Parties; nor will a Demurrer hold, on the Ground that the Representatives of a deceased Defendant are not made Parties, where there is no Representation taken out, and the Plaintiffs pray to be allowed to take out Administration. Nor on the Ground that an amended Supplemental Bill contained Allegations of Matter which had occurred since the filing of the Original Bill, together with Allegations of Facts which had occurred before the filing of the Original Bill, but which were charged to have come to the Knowledge of the Plaintiffs after the filing of the Original Bill.

Semble, *that a Demurrer will not hold to a Supplemental Bill, on the Ground of an Objection which existed at the filing of the Original Bill.*

The bill in this case had been filed by some of the shareholders against the directors of a mining company, for the purpose of setting aside (on the ground of fraud,) a contract for the purchase of a certain mining district, entered into by one of the defendants, a director, with the owner thereof. The bill also prayed an injunction to restrain the defendants from bringing actions against the shareholders for their subscriptions. The owner of the mines died soon after the filing of the bill. To this bill a demurrer was put in by the defendant Pike, on the ground stated in the judgment. A supplemental bill had been filed, which set forth allegations of fact which had occurred after the filing of the original bill, together with allegations of fact which had occurred before the filing of the original bill, but which were charged to have come to the knowledge of the plaintiffs after the filing of the original bill.

The LORD CHANCELLOR, having stated the case, said, upon this statement every person interested in the mine has also an interest in the relief. The object of this bill is to prevent the money of the shareholders from being appropriated to the use of any person otherwise than for the general benefit of the shareholders.

The precedent of *Hichens* v. *Congreve*, 4 Russ. 562, is strictly applicable to this case. In the absence of precedent, it is the business of this court to adapt its practice to the wants of the public, at the same time doing as little violence as possible to the rules of established practice. But in giving this judgment, I am following the authority of *Hichens* v. *Congreve*, which afforded to a large class of persons who were before without relief, and have no other jurisdiction to which they can apply. It is not, therefore, necessary to enlarge the jurisdiction of the Court for the purpose of relieving some of the parties to a company of shareholders coming for relief on behalf of the members, and all persons interested in the concern. This is the case on the original record. The case on the supplemental bill states that, "in furtherance of the plan set forth in the original bill, the defendants are proceeding to bring actions against the subscribers for calls upon their subscriptions." How then can it be said that this is not a proper subject of a supplemental bill, stating, as it does, a fact which has occurred since the filing of the original bill? A demurrer, for want of equity, cannot therefore be supported. The next ground of demurrer is the want of a representative of Lord Audley. If the representation is contested, such a party cannot be brought before the Court, and it comes within the exception to the rule as to parties. It can hardly be contended that the parties must see their property wasted pending this litigation, and that the Court must permit this waste. The bill, in this respect, prays that the parties may be allowed to go into the Ecclesiastical Court, in order that a representation to Lord Audley may be obtained. The plaintiffs are therefore taking the only means capable to get a representative. As to the question of the want of parties, I never recollect a case of the parties, defendants to the original bill, raising an objection to the want of parties to the supplemental bill which existed in the original bill. If the want of parties had arisen out of the supplemental bill, the demurrer might have been good. There might be an answer to the original bill, and a demurrer for want of parties to the supplemental bill; but if taken to the original bill, it could not be supported. The object of the bill must be beneficial to all the shareholders, and it is no valid objection that some of the shareholders take part with the defendants. In *Hichens* v. *Congreve* it appeared that persons who had interests in common with the plaintiffs, had wishes in favour of the defendants; but they may have other interests, not apparent, which direct their wishes. The rule to be followed is, that unity of interests, and not unity of wishes, should be regarded.

The next point of the demurrer is as to the introduction into the supplemental bill of some matters which are supplemental, and some which are not. Cases are cited [vide *Wray* v. *Hutchinson*, 2 M. & K. 235.] to show that this is not permitted; but this is not the time to make the objections. A proper time will come to

set that right; but on demurrer, and in this stage of the case, this objection cannot be sustained. A general demurrer must challenge the right of the plaintiffs to file such a supplemental bill.

Counsel for the bill.—Mr. Knight, Mr. Wakefield, and Mr. Rogers.

Counsel for the demurrer.—Mr. Jacob, Mr. Wigram, Mr. Wilcock, and Mr. Toller.

VICE-CHANCELLOR'S COURT.—April 20, 1837.

Re Newark Charities.

Sir Samuel Romilly's Act, 52 *G.* 3, *c.* 101, *only applies to presenting Petitions in respect of simple Cases for regulating Charities, and not where there are* bonâ fide *adverse Claims, or where there are complicated Questions to be decided.*

Query, in whom is vested the legal Estate of Charity Lands, under the 71*st Sec. of the Corporation Act?*

Query also, as to whether the Lord Chancellor has Power to appoint new Trustees under that Section?

This was the petition of sixteen new trustees, appointed by the Lord Chancellor under the Corporation Act, 5 & 6 W. 4, c. 76. The object of the petition was to have it referred to the Master, to approve of a scheme having regard to a former decree of the Court, and the statute of 5 & 6 W. 4.

The case, as to the material facts, was thus stated by the petition.—William Philpots, the founder of the charity, by his will, made in 1556, gave certain houses for the support of five poor men, and the maintenance of alms-houses and a chapel, which were to be under the control of the aldermen, who were to act with the advice and assistance of twelve coadjutors of the vicar of Newark, and two other honest persons, commoners of that town. The alderman and vicar had various other duties to perform, amongst the rest, to elect the commoners and coadjutors, and to pay the vicar 3*s.* 4*d.* for his trouble, and the two commoners 13*s.* 4*d.*, and to pay other sums. Some of the charity fund was devised in trust, to be employed in paving the town. At the time when the will was made, the corporation consisted of an alderman and twelve assistants, who were afterwards converted into twelve aldermen, and also a chamberlain, who acted as treasurer of the corporation. The charity, for many years, was administered under the trusts of this will; but, in 1732, an information was filed in the Court of Chancery for regulating the charity; and the Court directed a scheme to be laid before the Master, which was accordingly done; and, in 1738, Lord Hardwicke made a decree confirming the report of the scheme, which related chiefly to the appointment of the coadjutors and commoners, and the receiving the rents by the chamberlain.

Mr. Jacob and Mr. Blunt, for the petitioners, said that by sec. 71 of the Corporation Act, the Lord Chancellor had a power to appoint trustees to manage charity estates; he accordingly appointed the petitioners to be trustees of this charity, instead of the corporation; that, under these circumstances, it was found necessary that a new scheme should be made, in order to adapt the charity to the present state of circumstances.

The scheme directed that the chamberlain of the corporation should receive the rents: that office now did not exist, but the town clerk received them, after the chamberlain's office ceased to exist, and was still receiving them, and accounting to the corporation for his receipts, and not to the trustees. That trustees ought to have the power to appoint persons to receive the rents, otherwise their appointments would be a mere nullity. That, for the purpose of this scheme, the trustees had a right under Sir Samuel Romilly's Act, 52 G. 3, c. 101, which says, "Where an order of a court of equity shall be deemed necessary for the administration of any trust for charitable purposes," to present a petition instead of an information. Accordingly charities have been regulated by petition in the following cases: *Exp. Berkhempstead School*, 2 V. & B. 134; *Chipping Sudbury Case*, *In re Upton Warren*, 1 M. & K. 410; *Exp. Fowlser*, 1 Jac. & W. 70.

The Vice-Chancellor observed, that the vicar (who had an interest in the question,) had not been served; that the act only gave jurisdiction to appoint new trustees; and that the Lord Chancellor had told his Honour that he always refused to do more than to appoint the trustees. That the petition represented that, in pursuance of the 13 G. 3, certain buildings were taken down, and the town-hall erected; and that the rents arising from them should be disposed of as part of the charity estates; but that the corporation occupied the same without paying rent. His Honour observed, that also would raise a difficulty in disposing of the case by petition.

Sir William Horne and Mr. Bird, for the town-council, contended that this case fell within the 73rd section of the Corporation Act; for these trustees acted jointly with the corporation, and that the trustees could not act without their authority; that the corporation could not even be considered trustees, but that they took rights of their own under Philpot's will; that all the cases cited were antecedent to the *Ludlow Case*, which decided, that where there was a question as to the rights of third parties, or a complicated case, that an information must be filed. That the *Bedford Charity Case*, 2 Swan, 532, decided that the parties presenting the petition must show that they have an interest in charity funds, which these trustees could not do.

Mr. Knight also appeared for the town-council. He said that there were several persons interested who were not served with the petition. Branston and Gillstropp, members of the corpora-

tion, and the vicar, were not served. He also observed, that the 71st section did not even authorize the Lord Chancellor to appoint the new trustees; that the question was now before the House of Lords on appeal. The words are: "That the charitable estates shall remain in the old corporation until the 1st day of August, 1836, *or* until Parliament shall otherwise order;" that the word *or* ought to be construed *and*. The Lord Chancellor had certainly made several appointments of trustees under the section; but if the House of Lords decided in the way he expected, it would have the effect of reversing all those appointments; that the new trustees had not the legal estate vested in them by the new act. If *or* is not construed to mean *and*, the question is in whom the legal estate is vested. Some are of opinion that it is in the heir of the founder; some, in the crown; and some think it even in the Lord Chancellor. It is certain, however, that it is not in the new trustees. The construing the word *and* to be *or*, would set the matter at rest.

The VICE-CHANCELLOR (stopping the reply).—I have no sort of doubt that the time must arrive, in which the Court will have to do what was sought for by the petition; that is, to refer it to the Master, in order that some new scheme may be adopted to meet the new state of the charity. But the question now is, whether I can do so, on petition, under the Charity Act, 52 G. 3, c. 101. It has been stated to me, that it is exceedingly doubtful in whom the legal estate of the charity lands is vested: *primâ facie* it might be thought, that if the act, under circumstances similar to the present case, had declared that the estate of the old corporators should cease, and that it should be competent for the Lord Chancellor to appoint new trustees, the effect would be to cause the estate no longer to be in the old corporators: but where new trustees are appointed by the Lord Chancellor, although there were no direct words to that effect, yet it would vest the legal estate in those new trustees. When I was told that there were a variety of opinions on the subject, and when I look at the language of the act, I can understand that there might be great difficulty as to that very point. It does not appear convenient to direct a scheme for the charity, before the Court has settled in whom the legal estate is vested. The petition was presented by persons exercising the duties of trustees without having the power to compel payment, or of receiving the rents and profits of the land. And the petition stated an adverse claim, set up by the town-council; who, as the petition represented, claimed to elect certain persons. It appears to me, that that was by no means a question which ought to be decided off-hand: but if the question was *bonâ fide* made, it must be decided before I can direct a scheme. It is also represented, that it is doubtful who are the persons to receive the rents; and the question arises upon the fact of there having been no chamberlain for many years. The petition stated, that the

rents were formerly received by the chamberlain as an officer of the corporation, and represented that a case of some breach of trust as to the building of the town-hall and non-payment of rent. Now, I am of opinion that such a question cannot be settled except by information; and it must be filed not only against the town-council, but against all the persons named by the Lord Chancellor as trustees, and all those who in any way can be supposed to have the legal estate.

If such an information were filed, it might be the means of enabling the Court to extract the legal estate out of those in whom it may be vested. I have no power to hear this case on petition. According to the view taken by Lord Eldon and Lord Redesdale, in the case of the *Ludlow Charity* v. *Greenhouse*, 1 Bligh. N. S. 17, they were both of opinion that the act applied to simple cases only for regulating the charity. In this case there is a question as to a breach of trust committed by some of the trustees. This does not appear to be the simple case contemplated by the Charity Act, 52 G. 3, as the subject of petition. The question raised upon this petition can only be remedied by an information. If there was any dispute as to the mismanagement of the funds, or the mere economy of the charity itself, and all parties presented a petition against the trustees, the Court might be disposed to decide on petition: not so, where an adverse right is asserted, which the petition seeks to displace. To induce the Court to act, there must appear on the face of the petition a plain case, simply for the administration of the charity; but this petition exhibits such a multitude of questions, and seems to affect so many parties, that I think I have no jurisdiction to decide the question on petition. The Court could not with propriety give encouragement to the presenting of petitions in such cases as the present, after the opinions expressed by the Lords Eldon and Redesdale in the House of Lords, which have put a construction upon the act. The parties ought to have known the law, as laid down in the case of the *Ludlow Charities* v. *Greenaway*, in the House of Lords; and they must take the consequences of the want of that knowledge. I have no jurisdiction to order the costs to be paid out of the charity funds, especially in a case where it is not known how the funds are to be got at. I must therefore dismiss the petition; the costs to be paid by the petitioners.

LORD CHANCELLOR'S COURT.—Dec. 22, & April 20, 1837.

ARNOLD *v.* ARNOLD.

A Testator having died domiciled in India, and appointed by his Will Executors in India and in England; and his Executors in India having collected his Assets there, and paid his Debts, and remitted the Surplus to the English Executors for Payment of Legacies given by his Will to Legatees in England: — Held that such Legacies were not subject to Legacy-Duty, although the Will was proved in this Country, and a Suit instituted here in respect of such Legacies.

This was a petition, presented by the executors of Colonel Arnold, praying that a sum of money, standing in the name of the accountant-general, in this cause, might be paid to the legatees under the colonel's will free from the legacy-duty.

The testator having resided in India for many years, made his will in 1828, whereby he gave certain legacies to persons resident in England. He appointed four executors. The will was proved in India by one of the executors, the property there was collected, the testator's debts paid, and the residue, amounting to about £50,000, was remitted to England. The testator had property to a small amount, and owed some trifling debts, in England, where the will was also proved. In 1834, the plaintiffs filed their bill against the executors for an account, and to have their rights declared; and after certain proceedings had taken place in the Master's office, an order was made that the Master should apportion the property amongst the legatees.

A demand having been made by the crown upon the executors for the legacy-duty, in respect of the money remitted from India, this petition was presented by the legatees.

Mr. Wigram and Mr. Bethell, for the petitioners, contended, that as personal property followed the domicile of its owner, this property therefore would be subject to the revenue laws of India, where the testator died domiciled.

The mere act of taking out administration here, or the remitting money to this country, would not render such property liable to the legacy-duty of this country; and they cited the *Attorney-General* v. *Jackson*, 8 Bligh, 44; *Hay* v. *Fairlie*, 1 Russ. 117; and *Logan* v. *Fairlie*, 1 M. & C. 59.

The Solicitor-General and Mr. Romilly, for the crown, contended, that in order to make the legacy-duty attach, it was immaterial where the testator was domiciled, provided the property was administered in this county. The cases of the *Attorney-General* v. *Cockerell*, 1 Price, 165, and the *Attorney-General* v. *Beatson*, 7 Price, 560, decided that the legacy-duty would attach if the will

was proved in this country; and that in the *Attorney-General* v. *Jackson*, which was cited as an authority to the contrary, it did not appear on which of the several grounds the House of Lords decided the case. It appeared, however, that the Lord Chancellor, in that case, said, "that he did not intend to overrule former cases." They also cited *Logan* v. *Fairlie*, 2 S. & S. 284.

Mr. Sutton Sharpe appeared for the legatees.

The Lord Chancellor postponed his judgment, in order to read the case of the *Attorney-General* v. *Jackson*.

APRIL 20.

The LORD CHANCELLOR.—The question is, whether a sum of money which had been appropriated in India, and remitted to this country for payment of legacies given by the will of Colonel Arnold, is subject to the payment of the legacy-duty?

The testator, who resided in India, made his will there, naming four executors; some of whom resided in England, and proved the will in the Ecclesiastical Court here. Mr. Lawrance, one of the executors in India, alone proved the will in India, where the bulk of the property was. The English executors collected the estate, and paid the testator's debts in England. The executor in India did the same, and remitted the surplus, amounting to about £50,000, to the executors in England, which sum afterwards became vested in the name of the accountant-general in the funds, to the credit of an account called "The Indian Account." The children of the testator had filed a bill in this Court against the executors, for the administration of the testator's assets, and a reference was made to the Master to take the usual accounts. A report was made, by which he found that the money remitted amounted to about £50,000; and a decree was made, on further directions, by which the legacies were directed to be paid out of that fund.

The question now was, whether the legacies were subject to the legacy-duty? In the 56 G. 3, c. 52, which alone applied to this case, the terms were as general and comprehensive as could be used; so that it could not be said, that because a testator was out of England at the time of his death, that his legacies were on that account exempt from the duty. The property must also be out of the country to exempt it from the legacy-duty. This property was appropriated by the executor in India, and remitted to the executors here, and was put in due course of administration by the English executors. The circumstance of their taking out probate, and the suit instituted in this Court, was quite unnecessary in respect of the fund remitted; for the executor in India might have avoided the question, by paying the legacies in India, or by remitting the legacies directly to the legatees in this country. The words of the act referred to personal estate administered or collected in this country; so that they were not applicable to personal property administered or collected in India; and that was the ground of the

decision in the case of the *Attorney-General* v. *Cockerell*. The cases decide, that the filing of a bill in this court in respect of a legacy remitted to this country, will not render it subject to the legacy-duty; and I am of opinion that the circumstance of taking out administration in this country previous to a suit, in respect of such legacy, will not render it liable to the duty; because the rules of this court require that there shall be a representative of the testator in this country before a suit can be instituted. The question therefore, in this case is, whether, under these circumstances, the legacies are subject to the legacy-duty? My opinion is, that such legacies are not within the act. In the case of *Logan* v. *Fairlie*, 1 M. & C. 59, no administration was taken out in this country. If the case of the *Attorney-General* v. *Beatson* was an authority to be followed, it might be considered as a decision that the duty was payable in the present case; but the case of the *Attorney-General* v. *Jackson*, 8 Bligh, 44, is an authority ruling this case; for it was the same in all points, except one, (viz.) that in this case the probate of the will was taken out here, which was not done in *Attorney-General* v. *Jackson*. But that was of no consequence, for the reasons before stated. In that case, the executors stated by mistake in the pleadings, that the probate was taken out. The case of the *Attorney-General* v. *Jackson* was of the highest authority, having been first determined in the Court of Exchequer, the proper tribunal for revenue cases, reported in 2 Crom. & J. 382, which decided that the legacy-duty did not attach: this judgment afterwards received the sanction of the House of Lords, reported in 8 Bligh, N. S. 15. The question must therefore be considered as finally settled. It is a satisfaction to know that a question, which has been so long afloat, has at length been decided by the highest tribunal. Upon the authority of that case, and upon the circumstances of this case, I am of opinion that the legacy-duty is not payable on these legacies.

VICE-CHANCELLOR'S COURT.—April 29.

Evans *v.* Brown.

Notwithstanding the Exception as to the general Conclusion to which a Master has come is set down for Hearing before an Exception on the Subject of Evidence received by the Master, the latter Exception may have Precedence in the Hearing.

In this case several exceptions to the master's report were taken, one of which was, that the master had received evidence by affidavit, which course had been objected to by one of the parties on the ground that it was contrary to the practice of the master's office. Another exception related to the general conclusion to which the master had come. The exception as to the general

conclusion was set down first for hearing; but Mr. Knight was about to argue the other exception, as to the master receiving the evidence, when

Mr. Jacob took a preliminary objection, that, in whatever way a party chose to set down the exceptions, in that order they must be argued; and he cited the case of *Wilkins* v. *Stephens*, (not reported,) in which he said his Honour had lately decided to that effect.

Mr. Knight contended that the exceptions as to the evidence ought to be argued before the exceptions as to the general conclusion, since the hearing of the latter might become unnecessary if the exception as to the evidence prevailed.

The VICE-CHANCELLOR.—It appears to me that the ordinary rule is, to hear the exception as to the evidence on which the case proceeds in the master's office, before hearing the conclusion of fact or law founded upon the evidence. I understand that that was the course pursued in *Wilkins* v. *Stephens;* though I recollect it then appeared to me that, in ordinary cases, the exceptions ought not to be heard out of their order; but if the exceptions are of two characters, viz., one as to the judgment of the master in receiving evidence, and the other as to the judgment to which the master has come, the exception as to the evidence must be taken first, because, if the evidence has not been properly received, the judgment might have been different.

APRIL 15, 1837.

JOMBART *v.* WOOLLETT.

Parties having agreed that a Question as to the Right to the Proceeds of Bills of Exchange, which might have been tried at Law, should be tried and decided upon a Motion for an Injunction, but no specific Agreement having been made as to Costs, and the Defendants, after a Judgment having been given against them by the Vice-Chancellor, which was appealed against to the Lord Chancellor, who affirmed the Judgment, with Costs; held, that the Costs upon the original Judgment and the Appeal should be given to the Plaintiff.

In this case, reported ante, p. 226, where it appears that the Lord Chancellor dismissed the appeal with costs, Mr. Knight applied to have the produce of the two bills paid to the plaintiffs, and that the defendant might pay the costs.

Mr. Wigram opposed the application, on the ground that the parties had agreed that the question between them should be tried and decided upon the motion for an injunction; and although no express arrangement was made as to payment of costs, it must be understood, from the nature of the agreement, that each party should pay his costs; and that, in cases like the present, the Court ought not to interfere as to the costs.

The VICE-CHANCELLOR said, as he understood the case, the

effect of the arrangement was, that the question should be decided in a manner different from the ordinary course. The Lord Chancellor had, on appeal, given the costs, and his Honour did not see why he should not give the costs.

The case came to this. Supposing the parties agree upon a mode of proceeding different from the ordinary practice of the court, that the mode should be either by filing a bill, or by bringing an action, and in either case the question should be decided upon motion, and the agreement goes no further; as, for instance, if they had agreed that an action should have been brought, the costs, of necessity, would follow the usual course of such proceedings. The agreement here was only as to the mode of proceeding, and cannot affect the consequence of the proceedings.

His Honour made the order to pay the costs.

ROLLS COURT.—April 7, 1837.

Hawkins *v.* Hall.

A Bill for the Purpose of having an Annuity Deed declared fraudulent and void, with a Prayer in the Alternative for Permission to repurchase the Annuity; must allege that Notice to repurchase was given in pursuance of the Annuity Deed; and must allege that an Offer had been made by the Plaintiff to repurchase the Annuity, and that the Defendant had refused to allow him.

On this case (which is reported, ante, p. 236,) the Master of the Rolls had reserved his judgment in order to look into the papers relating to *Birch* v. *Joy*, in the House of Lords, to see whether it was an authority that the plaintiff had a right to repurchase the annuity.

The Master of the Rolls, in giving judgment, said, that this bill, among other things, prayed that an annuity-deed, dated the 11th of August, 1825, might be declared fraudulent and void, and that the same ought to be delivered up to be cancelled, and that an account should be taken of the yearly sums received, together with interest thereon, after deducting what was due in respect of the monies advanced with interest; and, in case the Court should not be of opinion that the annuity was void, the bill prayed that the plaintiff might be allowed to repurchase on payment of the sum of £3500, and the arrears in respect of the annuity. At the hearing of the cause, I was of opining that the plaintiff was not entitled to a declaration that the annuity and the deed to secure it was void; but it was contended that, under the circumstances of the case, the plaintiff was not entitled to repurchase. I took time to consider my judgment in order to look over the papers in the case of *Birch* v. *Joy*, which was decided in the House of Lords, but not reported.

The plaintiff in this case it appears was entitled to the benefit of an agreement for the purchase from Mr. Callow of an estate in

Norfolk of considerable value, and the defendant Joy had become entitled to an annuity granted by Callow. The grantor was entitled to repurchase, on giving twelve months notice. Notice was given to Joy of an intention to repurchase the annuity; but under the circumstances of the case, the opinion of the House of Lords was, that the notice was not given according to the terms of the proviso contained in the annuity-deed, so as to entitle the plaintiff to repurchase. The bill in *Birch* v. *Joy* was in the alternative. It is true the plaintiff, in framing his bill, might form it with a double aspect, but in so doing, he must frame it on the facts of the case, with a view that the case might warrant the decree. But in this case the bill was framed with a view only of having the annuity-deed declared fraudulent and void, and not so much with the view of repurchasing.

The deed contained a covenant on the part of the defendant, that if the plaintiff should, after the expiration of five years, be desirous of repurchasing, and should give notice of his desire, then the plaintiff would be allowed to repurchase, and that the trustee would re-assign the premises.

Now, this bill does not allege that any notice was given. The whole bill consisted of a series of allegations, endeavouring to establish a case for the purpose of having the annuity-deed declared fraudulent and void, and to have it delivered up to be cancelled, in the absence of all allegation of an offer having been made on the part of the plaintiff to repurchase the annuity, or of having given the defendant an opportunity of denying that such offer was made; and in the absence of any allegation that the defendant had refused to allow the annuity to be repurchased; and under the circumstances of the case, I am of opinion, that, in strictness, the plaintiff's bill must be dismissed with costs; if, by consent, I will make a decree, in order to ascertain what is due.

As to whether it was the duty of the defendant to keep up the policy, I cannot now decide the point, unless by consent of the parties.

VICE-CHANCELLOR'S COURT.—May 1, 1837.

Taylor *v.* Bailey.

A Demurrer taken ore tenus *for Want of Parties, was allowed, and the Plaintiff amended his Bill, but without remedying the Defect; the Defendant put in an Answer to the amended Bill, except that Part which was covered by the Demurrer. The Plaintiff took Exceptions to the Answer for Insufficiency, on the Ground that the Answer was not to the whole Bill. The Master allowed the Exceptions; the Defendant excepted to the Master's Report.—Held, that the Exception to the Report was good.*

Exceptions taken to an Answer for Insufficiency, and the Master

allows some of them, but disallows others; held not to be a sufficient Ground to warrant an Application to the Court to have all of them taken off the file.

A Demurrer taken ore tenus *for Want of Parties is not a Demurrer to the whole Bill.*

In this case the bill was filed against the defendant, stating that he was a creditor of a person abroad, who was not a party to the bill, but who was stated to be indebted to the plaintiff. The bill prayed discovery and account. The defendant answered as to part of the bill, and demurred for want of equity to the remainder. The demurrer was overruled by the present Lord Chancellor, then the Master of the Rolls, but he allowed a demurrer taken *ore tenus* for want of parties in respect of the debtor abroad, who appeared to be interested in taking the account, but without costs, and he gave a general leave to amend within three weeks, as the plaintiff might be advised; the bill was amended, without remedying the defect as to want of parties. The defendant put in an answer to the amended bill, except as to that part which was covered by the demurrer; the plaintiff took exceptions to the answer for insufficiency; by the master's report some of the exceptions were allowed and others were overruled. An application was then made by the defendant to the Master of the Rolls to have all the exceptions taken off the file, on the ground that some of them were irregular; but the motion was refused. The defendant excepted to the master's report.

Mr. Wakefield, for the defendant, said, that the Master of the Rolls refused to take the exceptions off the file, because some of them were good; the rule of the Court being that if even one exception is good, those which were bad cannot be taken off the file. *Partridge* v. *Haycraft*, 11 Ves. 570, explained in Belt's supplement. That the effect of taking the exceptions admitted the validity of the demurrer. That the plaintiff could not take exceptions to the answer to the amended bill, he not having taken exceptions to the answer to the original bill. *Ovey* v. *Leighton*, 2 Sim. & S. 234. He also said that there was no instance where a demurrer had been allowed to a part of a bill that liberty had been given to except; it had, however, been allowed in cases of pleas, but even that could not be done without applying for liberty to do so.

That the cases of *Taylor* v. *Wrench*, 9 Ves. 315, and *Miller* v. *Wheatley*, 1 Sim. 296, decided, that where the nature of the amendment is such as to require no further answer, the plaintiff is not precluded from taking exceptions; but in this case the leave to amend, being general, did not exclude an answer, and the plaintiff had a right to call for an answer as to that part of the bill not covered by the demurrer.

That the plaintiff's amended bill did not remove the ground of the demurrer. The defendant is not therefore bound to answer

that part of bill which the Court, by allowing the demurrer, says he shall not.

That Mr. Smith, in his book on Chancery Practice, vol. 1, p. 71, says, that if a plea or demurrer had been submitted to, or allowed, and the plaintiff amends, he must serve a fresh subpœna; so also if a plea or demurrer is coupled with an answer, and is allowed, and the plaintiff amends, he must serve a fresh subpœna. The amended bill ought to be dismissed, because it is liable to the same objection as the original bill, viz., that the defendant Taylor was out of the jurisdiction of the Court, and had not been served with a subpœna. *Stratton* v. *Davidson*, Russ. & M. 484.; and the cases referred to in *Esward* v. *Chadwick*, 2 Russ. 150: *Fells* v. *Brown*, 2 Bro. C. C. 276.

Mr. Bethell, with Mr. Wakefield, said, that the objection as to parties was not a common, but a vital objection, for the Court could not go on without J. W. Taylor being present. That the plaintiff, in excepting to the answer, did so in respect of that portion of the bill covered by the demurrer. If you receive an answer to the original bill, and do not treat the answer as insufficient, and afterwards amend the bill, and the answer to the amended bill is the same as the answer to the original bill, the plaintiff cannot except to such answer, because he has already treated it as sufficient.

MAY 2.

Mr. Wigram, for the plaintiff, contended that *Partridge* v. *Haycraft* did not apply to this case; that the Court had decided that the demurrer to the relief was bad; that the defendant had answered only a part of the bill, though a demurrer for want of parties was a demurrer to the whole bill, and therefore the answer to the amended bill must be to the whole of it.

The VICE-CHANCELLOR said that the demurrer for want of parties taken *ore tenus* was not a demurrer to the whole bill; it was a demurrer to the whole of that part of the bill. [*Vide East India Company* v. *Coles*, 3 Swan. 142.]

Mr. Wigram said, that the Master of the Rolls had refused to take the exceptions off the file, not on the ground of some of them being regular, because even if one was irregular, it would vitiate the whole; but the true ground of his decision was, that the parties, by taking a copy of the exceptions, had waived the irregularity.

The VICE-CHANCELLOR observed, that that could not be the ground, because a copy must be had in order to know whether the exceptions were irregular.

Mr. Wigram contended that there was a subsisting order, declaring these exceptions to be regular. He also contended that as they were filed after the bill was amended a second time, they must be taken as exceptions to the answer to the second amended bill; but he admitted that if they were exceptions to the answer to the first amended bill, that they would be irregular.

The VICE-CHANCELLOR said he was of opinion that they were exceptions to the first amended bill.

The VICE-CHANCELLOR.—I must stop the argument; I wanted to consider the question, as it appeared to me yesterday to have been a very puzzling one. I am of opinion that you are right (addressing Mr. Wakefield). The bill was filed and amended, and an answer put in to part, and there was a demurrer to the residue of the bill, and the demurrer assigned for ground the want of equity; the present Lord Chancellor, when Master of the Rolls, heard the demurrer; he did not allow the demurrer on the alleged ground of want of equity, but he allowed the demurrer, which was taken *ore tenus*, for want of parties. The effect of it was that there had been a judicial declaration, that that portion of the bill ought not to be answered so long as there is a difficulty as to parties. It is said as a fact that the bill has been amended, as to some party interested being out of the jurisdiction. It appears to me that there has been no such amendment made as would entitle the plaintiff to require the answer to the amended bill; consequently it appears the plaintiff has not put in such an amendment as will entitle him to discuss the question, until the defect has been removed by amendment; for, if not, it would be always open to the same objection heretofore made. I must consider it as if it had never been amended, and it stands in this way:—the Lord Chancellor having judicially declared that a certain portion of the bill is defective, the defendant at present is not bound to put in an answer to that part of the bill; exceptions are taken, as I understand, as to that part of the bill which was covered by the demurrer, and which the Lord Chancellor thought the defendant was not bound to answer; whatever the master's private opinion might have been, he was bound by what had judicially taken place; he might exercise any opinion as to the exceptions to the answer to that part of the bill which the defendant submitted to answer; but he was bound by the declaration of the Court, that the defendant was not bound to answer that portion which has been covered by the demurrer. It appears that some application was made to take the exceptions off the file; there was no doubt what was done was right; whatever my private opinion might be, if there was a statement of fact of what had been done by some other judge, I must consider it was rightly done; I cannot review his judgment; the consequence is that the exceptions stand and fall, if the Court so rules. It appears to me that it is meant to say, that if, on the face of the exceptions, some of them are good altogether, and others bad, the whole would be allowed to remain on the file. The master has thought, that as to such part of the bill which is covered by the demurrer, the answer was deficient; that there is a deficiency so far as it undertakes only to be an answer to that part of the bill which the defendant submits to answer; but the master has allowed exceptions to the answer to the whole bill, and consequently de-

ciding, that the answer is deficient in respect of its not being an answer to that part of the bill which the defendant has, by demurrer, succeeded in obtaining a judgment of the Court that he was not bound to answer. It appears to me that the master is clearly wrong; therefore the exceptions must be overruled. The exceptions to the report must be allowed.

LORD CHANCELLOR'S COURT.—May 4, 1837.

Smith *v.* Hurlock.

Where a Solicitor's Bill has been regularly examined and paid by another Solicitor, and the Papers delivered up, notwithstanding an Allegation of an improper Charge without Proof, and that, according to strict Taxation, a large Portion of the Bill might be taken off; the Court will not refer the Solicitor's Bill for Taxation.

No length of Time is a Bar to opening a Solicitor's Bill for Taxation, provided there be a distinct Allegation and Proof of improper Charges amounting to Fraud.

This was an appeal from an order made upon petition by the Master of the Rolls, referring a solicitor's bill for taxation after payment. This case was argued on the 20th and 21st of April, by the Solicitor-General and Mr. Stinton, for the plaintiff; and Mr. Wigram and Mr. Wilcock, for the defendant.

The facts of the case are stated in the judgment.

The Lord Chancellor.—This is an appeal from an order made by the Master of the Rolls, referring a solicitor's bill of costs for taxation after it had been paid by his client. The facts of the case appear to be as follows:—A gentleman of the name of Yems had employed Messrs. Goode and Co. as his solicitors, from the year 1818 to the time of his death, which took place in 1832. The petitioners in the present case having obtained administration to his estate, employed Messrs. Harris and Rye as their professional advisers, who applied to Messrs. Goode to send in their bill of costs against Mr. Yems, which they did in April, 1835, and after due examination and striking off some charges, the sum of £510 appeared to be due to Messrs. Goode, which was accordingly paid by Messrs. Harris and Rye, on Goode's agreeing to give up all the papers which were in their hands as agents and solicitors to the deceased Yems. In the month of October, in the same year, the major part of these papers were delivered up by them, and the present petitioners then, for the first time, intimated their intention to apply to have the bill of costs referred for taxation, on the ground that it contained various unreasonable and improper charges, specifying a certain charge for a journey to Northampton, which they allege to have been unnecessary, and to have been made without the consent or directions of Yems. On the question coming on before the Master of the Rolls, he was of opinion tha

the bill of costs ought to be referred for taxation, on the ground of errors and improper charges, and so it was ordered. It ought clearly to be understood that this Court will never withhold its interference for the purpose of protecting a client against improper charges by his solicitor; yet at the same time there is a limit to this interference, where it is clearly proved that the bill has been regularly examined and paid, and according to the established practice of this court, no errors except those which can be proved as amounting to fraud can be permitted to disturb such a settlement of an account. In the present case, although there is a general allegation of improper charges, none are proved to have been improper, nor is there any specific error or improper charge alleged, excepting the charges for a journey to Northampton, which business and journey the petitioners allege was not the business of Mr. Yems. But Messrs. Goode, in their affidavit, swear that it arose out of a suit to which Mr. Yems was a party, and that they took the journey at his request, which is not denied, so that it would be too much to order his bill to be retaxed after it had been duly examined and paid by another solicitor, merely because he had undertaken this journey at the special instance and request of his client. It has been considered by Lord Eldon, that in cases of this kind, the Court ought to have before it not merely a general allegation of error, but proof of some specific improper charge, otherwise the greatest injustice might be committed. A large portion of the bill may be taken off by strict taxation, though there be not a single improper charge. Though Messrs. Goode said that if there was to be any taxation it should be done before the papers were taken out of their hands, yet the petitioners never intimated that such was their intention until they had paid the bill and got possession of the papers. It is true that there is an affidavit by Mr. Harris the solicitor, as to a sum of £110 received by Messrs. Goode, for which no credit is given; and he also states that the clerk in court reduced their bill considerably. But an affidavit was made by Messrs. Goode in explanation of this. On this state of the evidence the order was made, and it remains to be seen what authorities are applicable to the case under these circumstances.

In *Langstaffe* v. *Taylor*, 14 Ves. 263, Lord Eldon says, "If a bill of costs has been settled and paid, and the payment has been acquiesced in, the Court will not refer that bill to be taxed as a matter of course. The general rule is, that an attorney's bill which has been delivered for the purpose of creating a capacity or bringing an action, cannot be taxed at the trial or after verdict, but under special circumstances the Court will refer it to be taxed, if it is shewn by affidavit that the business has not been done, or that the charges are fraudulent; and neither payment of the money nor a release, nor a judgment for the demand, will preclude taxation in such a case."

In *Plenderleath* v. *Fraser*, 3 Ves. & Bea. 174, he expresses a

similar opinion, and says, "the question is, whether the circumstances of this case bring it up to that, constituting charges so gross as, upon the head of fraud, to induce the Court to order taxation. There are certainly in this bill many charges which would be disallowed on taxation, though not grossly fraudulent, and there may be charges, morally speaking, very proper for the client to pay, which the master, regulating his judgment by the rules of the Court, cannot allow."

So also in *Clutton* v. *Pardon*, 1 Turn. & R. 301, where no intimation had been given of an intention to have the bill taxed, as in this case. There is no authority which supports an order for taxation, on a general allegation of improper charges. In *Howell* v. *Edmunds*, 4 Russ. 67, Sir John Leach was of opinion that the bill of the solicitor ought to be taxed, because it had been paid by the client, while the suit was pending, from which circumstance influence and pressure was to be assumed; and there was, in fact, evidence of actual pressure by the threat of an arrest.

In the case of *Gretton* v. *Leyburne*, 1 Turn. & Russ. 407, a sum of £1,236 was due to a solicitor from his client, who, after having opportunity given him to consult professional men, and examine the bill, came to a compromise with the solicitor, who agreed that £36 should be deducted in gross from the account, instead of taxing each particular item. £600 was paid to the solicitor, and four bonds were given, payable by instalments at distant periods, for the remainder. Three of the bonds were paid, and it was only when the last became due, that an application was made to have the bills taxed. Under these circumstances, and there being no evidence of pressure, the Master of the Rolls decreed, that the order for taxation should be discharged with costs.

In the case of the *Drapers' Company*, 2 Atk. 19. Lord Hardwick ordered the bill to be taxed, but there exorbitant charges were alleged and proved. In the present case a bill is delivered by the solicitors, and is subsequently paid. The relation of attorney and client no longer existed between them, another attorney is employed, and the bill regularly examined. There is no evidence of any pressure, or of any necessity for the possession of the papers; no intimation of any intention to have the bill taxed; nor is there any specific error alleged or proved; if there were, the authorities would justify me in affirming this order. Nor is there evidence offered of any demand for papers from the Messrs. Goode to clear up or explain any of the items in their accounts. The papers were not delivered until the bill had been regularly examined by the professional advisers of the petitioners, and this fact, with the absence of any pressure, formed a material feature in the present case, and distinguishes it clearly from some of the authorities on which the counsel for the petitioners have relied.

No length of time is a bar to an opening of a solicitor's bill for taxation, provided there be a distinct allegation, and proof of improper charges, amounting to fraud.

The Master of the Rolls seems to have been much influenced in his decision by the statements respecting the journey to Northampton, but that point has been very sufficiently explained by the affidavit of Messrs. Goode; and thinking as I do that the bill ought not to be opened for taxation on that ground, I feel bound to express my opinion, that the case could not have been so fully opened to the Master of the Rolls, as it has been in the argument on appeal, or he would probably not have been induced to consent to refer the bill for taxation. Under all the circumstances, though there might perhaps be some ground made for inquiry, yet there is none for opening the bill for taxation, and the appeal must therefore be allowed.

Mr. Stinton, on the part of the appellant, applied for costs, as no new evidence whatever was produced in the arguments on the appeal.

Mr. Wigram opposed this.

The Lord Chancellor.—I think the better course will be to dismiss the petition, and reserve the question of costs, about which the Court will probably entertain a strong opinion, if the petitioners take any proceedings to carry the matter further.

Note.—The case of *Walters* v. *Taylor*, since decided by the Lord Chancellor, involves a similar question, and will be reported.

VICE CHANCELLOR'S COURT.—January 27th, 28th, and May 6th, 1837.

Price *v.* Dewhurst.

A foreign Judgment, if obtained by Fraud, may be set aside by the Courts in this Country.

An Objection cannot be taken by the Defendant, on the Ground that the Plaintiff's Claim under Letters of Administration taken out in this Country to a Person who has made a Will, which has been proved in a foreign Country, especially where the Objection was not taken at the filing of the original Bill.

The Question whether a Person died Intestate or not, must be decided by the Law of the Country in which he died.

Where the Prerogative Courts in this Country, admit a Will to Probate, it may be construed according to the Laws of this Country, as opposed to the Laws of the Country in which the Testator died domiciled. Query.

It is unnecessary to file a supplemental Bill, where Administration has been taken out after the original Bill has been filed, it may be stated by Amendment.

Where a Party dies Intestate, his Property is to be Administered according to the Law of the Country in which he died domiciled.

Henry Seaton and Catherine Seaton having resided some years in the island of St. Croix, in the Danish dominions, were British

subjects, and domiciled in England at the time of their deaths. They left St. Croix in 1805, and came to England. They made a joint will in 1807, accordingly to the Danish form. On the 5th of April, 1814, H. Seaton made a sole will, appointing his wife sole executrix and residuary legatee; he died in July, 1819. Mrs. Seaton proved his will in England. Mrs. Seaton made her will on the 2nd July, 1822, and gave her real and personal estate to her two daughters, Mrs. Mary F. Henessey, and Mrs. A. A. Price, and appointed Mrs. Hennessey to be sole executrix. In the same year she made a codicil, appointing Mrs. Price a joint executrix. She died shortly afterwards; and in the same month that she died, the two daughters proved her will and codicil in the Prerogative Court of Canterbury. Henry Seaton and Catherine his wife had four children, a son Henry, and three daughters, Mrs. Henessey, Mrs. Price, and Mrs. Dewhurst. Mrs. Dewhurst died before the joint will was made. The joint will gave each of the surviving three children a quarter of the property, and the remaining quarter was given between the children of Mrs. Dewhurst.

On the 14th of January, 1826, which was, as it was alleged, the same day that she died, Mrs. Hennessey made a will, whereby she gave certain interests to Mrs. Price, to her niece Catherine Acre, to Edward Dewhurst, and H. Seaton; and she appointed Edward Dewhurst and H. Seaton executors of her will. This will was confirmed by the king of Denmark. Her Danish executors were made parties to this suit.

No administration was taken out to her in this country at the time this bill was filed, and an objection was taken that her personal representatives were not made parties; the consequence was, that Mrs. Price took out administration in November, 1836, and the bill was amended. (Vide ante, p. 146, where this part of the case is reported.)

After probate of Mrs. Seaton's will was taken out in England, the joint will was proved at St. Croix, according to the Danish laws.

In October, 1831, Mr. and Mrs. Price filed their bill against Mr. Dewhurst, (who had come to this country,) claiming under the sole will of Catherine Seaton.

The property in dispute was a debt of 60,000 pieces of eight, due from P. Marco, and secured on a plantation in St. Croix, called the Clifton Hill estate.

According to the laws of Denmark, Mr. Seaton and Mr. Hennessey formed themselves into a court, called an extraordinary court of dealing masters or executors, and distributed the St. Croix property among themselves. Mrs. Price, and her husband, Dr. Price, appeared (by attorney) at the meetings of this dealing court, held at St. Croix, and they protested against the proceedings, and afterwards appealed to the courts at Copenhagen.

Mr. Jacob, for the defendant, took an objection that the personal representatives of Mrs. Henessey were not made parties by supplemental bill, instead of by amendment, especially as it related

to the plaintiff's title, and that they could not take out administration, because at that time they had the will of Mrs. Hennessey in their possession.

Per Curiam.—How could it be recognised as a will as it was not proved in this country?

Argument continued.—Ordinarily speaking, it could not; but in this case the will had been proved in a foreign country; it was not therefore necessary to prove it here, especially as the property was out of the country. In support of which, he cited *Currie* v. *Bircham*, 1 Dow. & Ryl. 35.

Mr. Knight said that the Court never dealt with personal estate of a deceased person, without having the personal representative in this country before the Court, even if there is nothing to collect. *Turton* v. *Flower*, 3 P. W. 368. If any objection existed, it ought to have been taken by plea or demurrer, or at the time of taking the evidence.

The case of *Humphreys* v. *Humphreys*, 3 P. W. 351, decides that administration may be taken out after the filing of the bill, and that it might be charged either by supplement or amendment.

The VICE-CHANCELLOR observed, that it never occurred to him that there was any thing objectionable.

Mr. Jacob and Mr. Sutton Sharpe, for the defendants, contended that the proceedings in the dealing court, could not be set aside by the courts in this country.

The case of *Martin* v. *Nicolls*, 3 Sim. 458, decided that a foreign judgment could not be questioned in this country; and the case of *Becquet* v. *Mac Carthy*, 2 Bar. & Ad. 951, decided that to render a foreign judgment void, it must be shown clearly and unequivocally contrary to the law of the country in which it was made.

It would be an absurd thing if a foreign executor, coming to this country, is to be dealt with according to our law, and when he returns to his country, he is to be called to account there also. Besides that the plaintiffs appealed to the court of Copenhagen, thereby admitting the proceedings of the dealing court.

That his Honour, who was counsel in the case of *Thornton* v. *Curling*, had argued before Lord Eldon, that the will of a person domiciled in France could not be recognised in the courts in this country, and that it could not be treated as a will.

The VICE-CHANCELLOR said, that he remembered arguing the case, and that at the time he thought it a very difficult case to support.

They also cited *Kennedy* v. *El Cessilis*, 2 Swan. 325; *Barrow* v. *Jammemam*, Dick. 48.

Mr. Knight and Mr. Bethell appeared for the plaintiffs.

MAY 6.

The VICE-CHANCELLOR.—This case came before me under the following circumstances: It appears that Henry Seaton married a lady named Catherine Newton; and a question made was, whether

both of them were born in Great Britain, and whether they were domiciled subjects of Great Britain at the time of their deaths? As to the question, whether H. Seaton was, it appeared that unquestionably he was so, from one of the documents produced by the defendant (viz.): that document, which is a document of the Danish naturalization. There was no question on the evidence that both were domiciled in England some time before their deaths. And it appeared that the true result of the evidence is, that Mrs. Seaton was also a British-born subject; because one of the witnesses examined for the defendant says, in the course of his evidence, he could not tell in what year H. Seaton and his wife first arrived in the island of St. Croix: that showed that originally Mrs. Seaton was not found domiciled there, abundant evidence having been given that she was the daughter of Mr. Newton, of St. Christopher; and if the earliest evidence is that which shows that the individual was in British territories, the necessary, and indeed the only, presumption is, (if there is nothing to the contrary,) that she was there up to that time, and that she was a British-born subject. The evidence did not stop there; because persons, who were acquainted with the family, and were relatives by half-blood, speak of her as returning home, when allusion was made to her coming to England. And the will of her brother, which gave the legacy in dispute, speaks of all his sisters, describing them as inhabitants of St. Christopher, and married to persons having old English names. And though the will was made in Danish form, with reference to the mode of the gift, it was expressed in the natural English of an Englishman. Taking all these circumstances together, it appears that matter of fact proved that Mrs. Seaton was a British subject: whether she was or not, she and her husband left St. Croix in 1805, and resided in England. He died in 1819; but it appears, that shortly after they came to England, viz., in 1807, after having resided some years in St. Croix, when their habits in that country may be supposed to have made some impression in their minds, they made an instrument, in January, 1807, which is described in the pleadings as a joint-will; an instrument which, according to the Danish laws, was admitted. But it appears that, after that deed was made, (viz.) on the 5th of April, 1814, Henry Seaton made a sole will, by which he appointed his wife sole executrix and residuary legatee. He died in July, 1819, and Mrs. Seaton proved his will in the Prerogative Court of the Archbishop of Canterbury. The will of Mrs. Seaton's brother had given her 60,000 pieces of eight, which it appears, after the death of the brother, were invested on mortgage of a Danish plantation in St. Croix, belonging to P. Marco, and that sum was stated to be equal to £13,500. There was evidence to show that, after the death of H. Seaton, the interest on the mortgage was paid to Mrs. Seaton during her life. She made her will on the 2nd of July, 1822, and by that she gave all her real and per-

sonal estate to her two daughters, Mrs. Hennessey and Mrs. Price, and appointed Mrs. Hennessey her sole executrix. On the 1st of November, 1822, she made a codicil, by which she made Mrs. Price a joint-executrix. She died in November, 1822. Mrs. Dewhurst having died before the joint-will was executed, the same month her will and codicil were proved by the two daughters. It appears that H. Seaton and his wife had four children; one son, named Henry, and three daughters, Mrs. Hennessey, Mrs. Price, and Mrs. Dewhurst. But it appears that Mrs. Dewhurst died before the joint-will was made. The effect of the joint-will was to give one-fourth of the personal estate of H. and C. Seaton to each of the three children, and the remaining fourth amongst the children of the deceased Mrs. Dewhurst. It appears that Mrs. Hennessey died after the joint-will was made; the year does not appear; and it seems that administration was taken out to her in this country by Mrs. Price. A technical objection was raised at the hearing, on the ground that the personal representatives of Mrs. Hennessey ought to be made parties. The result was, that administration was taken out to her, in November, 1836, by Mrs. Price; and the objection was removed by stating the letters of administration by amendment. There was another objection taken: it was said, that inasmuch as that there was a will of Mrs. Hennessey proved in a foreign country, that administration could not be taken out here; I think that can be no substantial objection, especially as the defendants did not take it at the time the original bill was filed. Well, it appears that after probate had been granted of the will of Mrs. Seaton, some steps were taken in St. Croix, which were equivalent with the proof of the joint-will; and also some further proceedings took place with respect to the will which constituted the question in the case. I take it to be quite clear, that if there had been nothing more than this, (viz.) probate first granted of the husband's will by the Prerogative Court to the wife, and then the probate granted in this country to the wife's will, that any other probate which might have been taken out in another country would, by the law of this country, be subservient to the probate granted here. And as I am to administer the English law, I apprehend it is clearly settled, by a variety of cases, such as *Trotter* v. *Trotter*, 4 Bligh, N. S. 502, and the cases mentioned in the appendix to the case of *Balfour* v. *Scott*, 6 Bro. P. C. 550, beginning with *Bruce* v. *Bruce;* and on the authority of *Pipon* v. *Pipon*, and several other cases, that the rule of law in England is, that where a person dies intestate, his personal estate is to be administered according to the law of the country in which he is domiciled at the time of his death; and whether he is a British-born subject or not, the rule is, that if he dies intestate, the country where he is domiciled shall have his personal estate. The question, whether he died intestate or not, must however be determined by the law of the country in which he

died: which is provided, in the most decisive manner, in *Stanley* v. *Bernes*, (the latest case on the subject). In that case, the question was this: a British subject became domiciled at Madeira, and made several testamentary papers; some executed in the form required by the Portuguese laws, and others not executed according to that form; but they were all executed according to the forms required by the laws of England. The question first came before Sir J. Nicholl, and the case is reported at length in the 3rd volume of Hagg. Eccl. Reports, p. 373; and he held that probate might be granted of all the testamentary papers. From that decision, there was an appeal to the High Court of Delegates; and they held, that the testamentary papers intended to pass the property in this country, and which were not executed according to the Portuguese form, should be admitted to probate, and that the others should not. The question is, how far, when it appears to be a will to which probate has been admitted, it shall be construed according to the law of England, as opposed to the law of the country in which the party is domiciled? That question arose in the case of *Thornton* v. *Curling*, before Lord Eldon, in which I was counsel. I have been furnished with a report of the case, by Mr. Russell. There a bill was filed by the illegitimate child of Colonel Thornton; and the bill stated the fact that the probate of Colonel Thornton's will had been granted in this country by the Prerogative Court; and it represented on the face of the bill (which was the real fact,) that Colonel Thornton, though a British-born subject, was domiciled in France, and that, by the French law, no will could be made to the effect in which his will was made. I remember arguing the case for the plaintiff; and Lord Eldon seemed to think that, for the purpose of the motion, he was completely bound by the English probate, and that, if the Prerogative Court had admitted the will to probate, then *primâ facie* it might be considered as an English will. He says, in one part, (speaking of the argument of the plaintiff's counsel,) that he had put himself in this difficulty. He said that this could not be considered as a will; but his lordship said, that if the Ecclesiastical Court had given probate, it was another matter; and that, on the hearing of the case, the will might be read, because the probate was granted in this country. But if the law of England was such, that the will was to be construed according to the law of France, the will would then be void, because it was so by the law of France: in which case, the executor might be a trustee for the next of kin. There the Lord Chancellor left the matter in doubt; and I understand that proceedings were afterwards taken in France, and the business was ultimately compromised: so nothing more was heard of the case.

But in a case before Sir John Leach, *Anstruther* v. *Chalmer*, 2 Sim. 1, the question was this: it appears that a Scotch lady domiciled in England executed a will in the Scotch form during her visit to Scotland; she had personalty in England, and she

afterwards died in England. What Sir John Leach held was, that, "By the law of England, where an absolute interest in personal property is given by a testamentary instrument, there the gift fails if the donee die in the lifetime of the testator, and Miss Anstruther being domiciled in this country, the law of England must prevail in this case. The next of kin are therefore entitled." But it appears to me that, in the present case, there was not so much a question of how far the will should be admitted to probate, because here it has been admitted to probate by the Prerogative Court of this country, and the will, on the face of it, was the will of an English person; there was therefore no question that it could be construed by any other laws but the English laws. There was a further question, whether, in consequence of some proceedings which had taken place in the island of St. Croix, which were in the nature of a judicial decision, there has not been such a legal operation as would prevent this court from applying the rule of the English law to the personal property of the deceased. Now it appears to me not necessary to enter into the question, which, in *Martin* v. *Nicolls*, 3 Sim. 458, was raised, how far it was competent for courts in this country to allow a dispute in respect of foreign judgments. Lord Brougham, I find, is made to say, in one of the cases in Mr. Bligh's Reports in the House of Lords, [*Houlditch* v. *Donegal*, 8 Bligh, N. S. 342,] that he did not approve of *Martin* v. *Nicolls;* and that a foreign decree might well be made the ground of a suit in another country. Now, without going to the length, to which his lordship has gone, I apprehend that I am at liberty to look and see whether a judgment obtained abroad has been fraudulently obtained, and, if I find it so, why then the court is at liberty to deal with the parties, and they are bound the same, as if the foreign judgment had never taken place. In reference to that point, I first directed a search to be made in the register's book, to see what information could be found in regard to *Blake* v. *Smith*, which occurred in 1809 and 1810; the exact statement of the case is made up from the original brief, by Mr. Russell. I was counsel in the case for the plaintiff, and it made a strong impression on my mind. It was this:—On the 25th of June, 1808, Blake and Smith entered into articles of partnership in London, for ten years, in the business of wine merchants and general merchants. On the 1st of August, 1806, Smith, Martineau, and Blake, entered into articles with Lopez & Co., to carry on business in Portugal, in the same trade. Lopez & Co., by the articles, provided, that if any partner wished to retire, a certain notice should be given. Smith and Martineau tried to exclude Blake from the London partnership; and in January, 1809, he filed his bill for an injunction; on the 24th January, 1809, an injunction was granted on the footing of the English articles of partnership. That partnership would expire on the 24th June, 1810, and the Portuguese partnership in August, 1812. In February, 1810, a supplemental

bill was filed, by Blake, stating, among other things, that a decree had been fraudulently obtained by the defendants, in Portugal, for dissolving the house of Martineau, Lopez, & Co. How it happened, does not appear; but it so happened, that, on the 13th of March, both motions were refused; on the 21st of May, the defendant filed an answer. It appears that on the 21st June, 1810, in consequence of some new attempt made by the defendant, the plaintiff gave notice of a new application to extend the injunction, and his affidavits established the fact of hostile proceedings having been taken in Portugal. The Chancellor proposed to the defendants to try certain issues at law, which they refused; and on the 4th July, 1810, the Lord Chancellor granted an injunction to restrain the defendants from dealing in port wine, otherwise than in partnership with the plaintiff; and that the articles of August, 1806, might be dealt with; thus the court, in fact, by means of the injunction, set aside a judgment obtained in a foreign court. That the general principles on which the court acted, was in consequence of the foreign judgment having been obtained by fraud. The question is whether the proceedings, which had taken place in the court of dealing in St. Croix, can be considered fair and just; or whether they did not carry on their face a conviction that they were fraudulent. Now, these proceedings were very long; but it seems that H. Seaton and Edward Dewhurst having obtained a Danish probate of the joint will, managed so that they were entitled, according to the Danish law, to hold a court of dealing in St. Croix; the Danish lawyers, who had been examined on the nature and effect of the court, did not differ much on its nature and jurisdiction.

His Honour then read the evidence of the Danish lawyers, as to the jurisdiction of the courts in St. Croix, which was to the effect that the dealing court had power only to collect, and not to distribute, the effects of the deceased. Could this Court therefore determine in their favour, a case in which they themselves were interested? Well, it appears that in order that the matter might have the appearance of being carried on in due form, Seaton, Dewhurst, and another person, form the Court, and it appears that they met and produced the joint will and some document called the copy of Mr. and Mrs. Seaton's will in England.

A letter was written to the husband of Mrs. Price, intimating the intention of dividing the property, and that she should appoint some person to attend on her behalf; it appeared that as a matter of course, she appointed an attorney to watch the proceedings.

It appears that on the 13th of March, 1828, a meeting of this dealing court took place, and a letter which had been written by Dr. Price, in answer to the letter sent to him, the mortgage of P. Marco, the will of Mrs Henessey, and the power of attorney, were produced, and it appears that some objection was made as to the law on the subject, and a question was raised, whether the two documents were the copies of the will of the Seatons; and after

some little discussion the meeting was dissolved, and another directed to be held. Several other meetings took place, and it ended by the executors dividing the property in their own favour, which, for aught I know, may be according to the Danish laws. Is that a sort of proceeding to be set up against the law of this country, which declares that the personal property of a deceased individual whose will has been admitted to probate, shall be administered according to the will? it would be idle and vexatious to say that such a proceeding shall be allowed. I apprehend that whenever you see that justice has been disregarded, and parties make use of legal proceedings, as a matter of form, for the purpose of doing that which was contrary to all notions of justice, and where the parties were deciding for themselves, what was to be their own, the Court would consider those proceedings of no value or importance. It appears that I am at liberty to deal with Dewhurst and the other defendants on this record, who have possession of the assets, and that I am at liberty to declare that so far as that judgment in St. Croix, which tended to give the beneficial interest in the personal estate to Dewhurst, or the other defendants, was fraudulent and void; and so far as they have received, or may receive, the personal property of the deceased, they are accountable to the executors of Catherine Seaton; and I am of opinion, that this case has been unfairly dealt with on the part of the defendants, and therefore that the costs ought to be given against them.

LORD CHANCELLOR'S COURT.—May 22.

Heap *v.* Haworth.

The Plaintiff having obtained an Order for the Examination of Witnesses, and to pass Publication, the Defendant did so also, and the Plaintiff joined in his Commission. Held, that the Course of the Defendant having been irregular under the 17th of the amended Orders of 1828*; and that the Plaintiff, notwithstanding his having joined in the Commission, was entitled to have the Depositions of the Witnesses, taken under the Order obtained by the Defendant, suppressed.*

The plaintiff in this suit had obtained, *ex parte*, an order for the examination of witnesses, and to pass publication.

The defendant then applied to the plaintiff on the subject, with a view of obtaining a commission to examine witnesses, and a correspondence took place between the solicitors of the parties; the effect of which, as it was contended, was a consent by the plaintiff to the defendant's taking out the commission.

On the 24th of October, the defendant obtained an order for a commission to examine witnesses, and the plaintiff joined in the commission. The plaintiff now moved to suppress the depositions

of the witnesses taken under the order obtained by the defendant for irregularity.

Mr. Wakefield and Mr. Richards for the plaintiff, argued that the plaintiff's commission was regular according to the 17th of the amended orders of 1828; and that the defendant's was irregular; and that as the defendant had obtained the order, however irregular, the plaintiff was bound to join in it, so far as it be deemed joining by the mere act of furnishing names. The defendants ought to have applied to the court to remove the plaintiff's order, or to enlarge publication; neither of which they had done; and they did not even give notice of their proceeding upon the order, until they executed the commission on the 23d of December, knowing at the time that the plaintiff had given rules to produce witnesses and pass publication.

The Solicitor-General, Mr. Wigram, and Mr. Cole, for the defendants, contended that the plaintiff's passing publication was irregular, and his consenting to the defendant's commission had the effect of enlarging publication.

Per Curiam.—With the knowledge of that publication passed, you examine witnesses, which is irregular; their having joined in your commission, was a good ground for you to have applied to have publication enlarged; the 18th rule applies to passing publication; the 17th rule gives the plaintiff a certain time to pass publication, and in default by the plaintiff, a certain time is allowed the defendant. In this case the plaintiff has not made default, so that the defendant's case is not brought within any rule.

Argument continued.—The plaintiff knowing that the defendant had obtained an order for a commission to examine witnesses, and joining in the commission was equivalent to enlarging publication, until the defendant had examined his witnesses. The time for the plaintiff to have made the objection would have been when he was served with the order for the commission.

The Lord Chancellor.—It appears to me that the defendant is irregular, and that the plaintiff is regular; the defendant has done nothing which the 17th order prescribes; he does not take the course pointed out in the 18th order for enlarging publication; the plaintiff's publication therefore passed. It was very true that the defendant having obtained a commission, the plaintiff joined in it, and so far sanctioned the proceeding; if an application had then been made to the court, on that ground, to enlarge publication, it would, in all probability, have been enlarged. He allowed publication to pass without having adopted the proper course, and he acted irregularly; the question is, what ought now to be done? Am I to suppress the depositions altogether, or allow the defendant to apply to the court for leave to examine the witnesses again; I think it would be better to allow the evidence to remain, and give the plaintiff his costs.

It was however settled that the case should be again mentioned to the court.

LORD CHANCELLOR'S COURT.—May 24, 1837.

Waters *v.* Taylor.

Solicitors' Bills of Costs for Business commenced 28 *Years, and concluded* 18 *Years, before a Petition presented for Taxation, the Amount then having been made the Subject of a Security which was afterwards given up and another Security taken while the Relation of Solicitor and Client continued; the Solicitor with the Privity of his Client having bought his Partner's Share of the Debt, and the Client's Affairs having for* 15 *Years been under the Care of another Solicitor, no attempt made during that Time to open the Account, and the Petition presented for that Purpose not being supported by Evidence of Fraud, and the Client having had Possession of all the Papers, the Bills of Costs incurred prior to the Time when the Security was given not opened,* Secus *as to those subsequently incurred.*

The settlement of a solicitor's bill pending a suit, and whilst the relation of attorney and client continues, afford grounds upon which the account will be much more easily opened, p.

Though the personal representative of the client cannot have the bills taxed, if the solicitor seeks to enforce payment out of a fund in court, the court will direct a taxation as between the party claiming the charge, and the party representing the fund, p.

The question in this case arose upon an appeal against an order made by his honour the Vice-Chancellor, upon a petition to tax a solicitor's bill of costs; the facts are stated in the following judgment:—

The Lord Chancellor.—Having, very recently, in the case of *Harlock* v. *Smith*, had occasion to state my view of the cases relating to taxing bills of solicitors, which had been settled and paid; it will only be necessary in this case for me to state the facts as they appear in evidence, and to apply the doctrine to be deduced from the cases to such facts.

That part of the Vice Chancellor's order, which has given rise to the discussion in this cause, directs the taxation of all bills of costs of the late Mr. Mills, and of his firm of Mills, Robinson, and Young, delivered before the 20th of July, 1819, in respect of business done for the late Mr. Waters, and of the receipts on his account; and declares that the sum so found due shall be treated as the sum secured by the deed of the 20th of July, 1819.

There is but little dispute as to the facts. It appears that in 1814 and 1816, Mr. Mills became assignee in trust for Mr. Waters of two annuities, supposed to be charged upon the Opera-House; and it appears from a recital in a deed of 1817, that Mr. Waters was before that time indebted to Mr. Mills in a certain sum due on a mortgage made by Mr. Goold, to whom Mr. Waters was executor; but whatever may have been the nature of the security,

by the deed of the 4th of February, 1817, that sum is recited to be so secured, and another sum stated to have been that day ascertained to be due to Mills and Company upon an account stated, are charged upon the two annuities and the arrears due. The deed of 20th July, 1819, recites that there are now due to Mills, upon the security, £2018, and to Mills and Company, £4078; and that it was desirable to enable Mr. Waters to settle his purchase money, that these charges upon the annuities should be released. They accordingly released such charge, and Mr. Waters, with the concurrence of Mr. Chambers and Mr. Mayhew, (who appear to have had themselves a charge upon the property) assigned all his interest in the theatre, and in the monies arising therefrom, to secure the debt so secured by the deed of 1817, and subsequent additions to it, making together due to Mr. Mills £2929, and to Mills and Company £5087.

In 1822, Mr. Mills died, and Dr. Sutherland is his representative. From that time Mr. Leake acted as solicitor for Mr. Waters. From Mr. Young's affidavit it appears, that in 1811, the first bill of costs was delivered; that in 1811, Mr. Waters gave a bill of exchange for the balance due at that time; that in 1816, other bills were delivered, and the amount secured by the deed of 1817; that upon the dissolution of partnership between Mr. Mills and Messrs. Young and Robinson, the latter were desirous of having Mr. Waters's debts paid; that a meeting took place, at which Mr. Waters and Mr. Mayhew were present; that Mr. Waters stated his inability to pay at that time, and that thereupon Mr. Mills undertook to satisfy his partners their shares, and take the debt upon himself, which he afterwards did, and so thereby became solely entitled to receive what was due; that, thereupon, the sums were settled; on Mr. Mills asking whether he had looked through the bills? and Mr. Waters answering yes, and they were much less than he expected, and that he would not examine them further.

I mention the fact that Mr. Mayhew was present; not because I find any proof of his acting for Mr. Waters, but because if there had been any inaccuracy in Mr. Young's statement of what took place, Mr. Mayhew might have been called upon to explain it.

Founded upon these securities, and there being a large fund in court subject to the charge, Dr. Sutherland, as representative of Mr. Mills, in July last, presented a petition for payment of what was due to his estate, but the petition having been adjourned to November, Mr. Winchester, as assignee of Mr. Waters, presented a cross petition, praying in substance what the order has directed.

In support of this application to have the bills taxed prior to the securities of 1817 and 1819, the petition alleged that the bills had not been investigated by any person on behalf of Mr. Waters; that £747 4*s.* 4*d.*, part of the sum secured by the deed of 1819, was for Waters' costs in *Taylor* v. *Waters;* that the suit was dismissed with costs in 1821, and that the taxed costs amounted only

to £229 19*s.* 4*d.*; that in 1830, the costs of all parties in *Waters and Taylor*, were ordered to be taxed and paid; and that Mr. Waters's costs comprised in the bills, secured by the deed of 1819, were claimed at £5855 9*s.* 10*d.*, but were reduced by taxation to £3971 5*s.* 3*d.*, £1884 4*s.* 7*d.* having been taken off; and the petition infers, though it does not in terms state, that this taxation was attended by Messrs. Young and Company, as solicitors for the representative of Mr. Mills and Mr. Barry's affidavit, is calculated to lead to the same conclusion; but Mr. Elliott positively denies that the attendance was on behalf of Mr. Mills's estate; but states that it was given at the request of Mr. Leake, for the protection of Mr. Waters's estate, and the charges for such attendance, mentioned in Mr. Barry's affidavit, leave no doubt on my mind that such was the fact.

The taxation, therefore, of *Taylor and Waters*, in 1821, and *Waters and Taylor* in 1830, were not between Mr. Mills's estate and the client, but between the parties in the cause, and cannot therefore be used in evidence against Mr. Mills's representative; besides which it does not appear what particular of the costs claimed and taxed off in *Taylor and Waters*, related to the period between 1819 and 1821, when the connexion between solicitor and client ceased; and Mr. Young states that of £10,000 of costs only £4,500 related to the suits; and Mr. Elliott states that many of the items struck out upon taxation were so struck out only because they did not belong to the suit, the costs of which were alone in question, and I do not find that denied in any subsequent affidavit. Now, if the result of this taxation does not establish the right to have the bills before 1819 taxed, I look in vain for any other ground; because, though some other objections were made to the bills in the petition, I do not find any of them supported by evidence. The petition alleges that Mr. Mills appeared for Mr. Palmer, as defendant, in *Waters* v. *Taylor*, and has charged attendances for him against Mr. Waters, although he, by his answer, had declined acting as trustee.

It is not disputed that Mr. Waters was properly charged with Mr. Palmer's costs, but it is intended to be inferred that the costs subsequent to the answer, might have been spared; I find nothing in any affidavit to prove this to have been so, but if there had been any such evidence, it could amount only to this, that the cause in that respect might have been more economically conducted; a point which, if established, would not serve for the present purpose.

The only other allegation of charge in the petition is, that the bill contained various charges for sequestrator's fees, which appeared upon taxation not to have been paid; but what those charges were, or in what bill they are to be found, or what period they related to, is not stated; and I find no evidence to support the charge. It may indeed well be supposed, that after so many years, and with the admitted fact of the loss and destruction of pa-

pers, and the unrestricted access to all other papers afforded to the solicitor of Mr. Waters, and the delivery to them of all they required, that the evidence of many payments cannot now be produced by the representative of Mr. Mills, which of itself affords the strongest possible reason against referring the bills to a taxation at this time.

The result of all this evidence comes to this, that the business to which the bills apply, commenced twenty-eight years ago, and was concluded eighteen years ago; that some of the bills were dated so early as 1811, twenty-six years ago; that in 1819, the amount then claimed to be due, was secured upon certain property; that in 1819, for the convenience of the client, the solicitors gave up their security and with the concurrence of other prior incumbrancers took a new charge upon other property. That upon that occasion the sum being ascertained, the solicitor, Mr. Mills, with the knowledge of the client, Mr. Waters, and for his accommodation, bought and paid for his partner's shares of the debts; that from 1822, now fifteen years ago, Mr. Waters's affairs have been under the care of another solicitor, but that no attempt was ever made to open the account so closed in 1819, until last November; and that the attempt then made was not supported by that which alone could give it any title to success, namely, allegations and proof of such dealing between the solicitor and client or agent, error, and improper charge in the bills, as could amount to evidence of fraud. It is made to rest entirely upon the alleged reduction of the bills upon a taxation to which the solicitor or his representative were no parties; and under the circumstances I have before observed upon, the client has not only permitted eighteen years to elapse since the date of the security without objection, but has had the use and possession of all papers he required; he has had the benefit of the long forbearance of the creditors, to obtain which Mr. Mills, with his privity, purchased the shares of his partners in the debt. It would require a very strong case indeed to induce me to open an account, if there had been nothing else in answer to this attempt, but not only are there those strong grounds of resistance to the application for a taxation, but there is an absence of all that is required to support it.

The case indeed differs from the case of *Harlock* v. *Smith*, in this, that the security was taken while the suits were depending, and while the relation of solicitor and client continued; but so it was in *Cooke* v. *Setree*, 1 Ves. & Bea. 126, and in *Plendaleith* v. *Fraser*, 3 Ves. & Bea. 174, and *Gretton* v. *Leyburne*, 1 Turn. and Russ. 407; the relation of attorney and client continued at the time of the settlement.

No doubt the settlement or payment of a solicitor's bill, pending a suit, and whilst the relation continues, affords grounds upon which the account will be much more easily opened and referred for taxation than in other cases; but if these circumstances alone

were in all cases to be held sufficient ground for a taxation, no solicitor who continues to act for a client, would be secure of any settlement during the life of his client, and the continuance of one of those suits which not unfrequently occur in the court, would prevent the possibility of any settlement between the attorney and the client. It is however unnecessary to consider this point further, because, in this case, I find acquiescence for 26 years, and the engagement of the partners during that time, and the consequent destruction of vouchers and delivery of papers, and the important fact of the purchase by the solicitor with the privity of the client, of the benefit of part of the debt so secured, and the absence of any proof of improper dealing on the part of the solicitor, or of any such errors in the bill, settled as the decided cases require for the purpose of opening an account and sending a solicitor's bill so long settled and secured to a taxation.

Having in this case and in that of *Harlock* v. *Smith*, had the misfortune to differ from the Master of the Rolls and the Vice-Chancellor, I have endeavoured, by a careful examination of the cases, to ascertain the limit of the rule as laid down in them. To that rule, as I find it laid down, I am anxious to adhere, as I am persuaded that whilst it affords every protection to the client against any improper dealing or extravagant charges on the part of the solicitor, it does not deny to the solicitor that justice to which all men are entitled—the means of settling their accounts, and of winding up their affairs, which, if the rule was to be further relaxed, it would be in most cases impossible for them to accomplish. I am bound to act upon the opinion I have formed, that the settlement and security of 1819 has not been successfully impeached. The subsequent bills must be taxed, and the account founded upon the security of 1819 must be taken.

All this would have been ordered upon the petition of Dr. Sutherland. The petition of Mr. Winchester was unnecessary except for the purpose of obtaining a taxation of the bills prior to 1819; and as it has failed in that object, for that reason I think it must be dismissed with costs.

It was objected, upon the authority of some of the cases cited, that Mr. Winchester not being the client, could not have the bills taxed; but this is not a case for taxation simply under that head, but Dr. Sutherland seeks to enforce payment out of a fund in Court, and which was necessary and proper in order to ascertain the amount of the charge. The Court will direct a taxation as between the party claiming the charge, and the party representing the fund, who in this case is Mr. Winchester.

THE END.

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Where a firm carrying on business abroad enters into an agreement with a merchant in England to have a credit by his accepting their bills and they accordingly draw and remit him bills purchased by them and indorsed to him, to the full amount of the bills, accepted by him, and he becomes a bankrupt, having taken up only one of his acceptances, and discounted and received all the bills remitted, except two, held that without there is a custom established to the contrary, or a special contract between the parties to the bill to cover the acceptance ought to be kept till they are due, and that as the bills are remitted to meet obligations which were never met, and there was no contract express or implied to sell the bills, the two bills not discounted at the date of the bankruptcy belonged to the firm and not to the assignees of the bankrupt, 229.

Charge.

Merger of a charge in the freehold, where the owner before his death was unable to express his intention, and it did not appear to be for his benefit to keep it up, 98.

Charge on Testators residuary Estates.

The words "it is my will that my debts and all the above legacies be paid and discharged within six months after my decease," are not sufficient to charge the testator's residuary real estates with payment of debts and legacies, but the legatees are entitled to all the benefit which the law of marshalling can give them, 204.

Charge by implication.

A general direction to pay debts in a will is a charge by implication, and may be controlled by a subsequent specific charge, 203.

Charity.

Devise to a charity out of a mixed fund—release by the heir at law. Whether the words "founding, establishing, and endowing," necessarily imply purchasing land, 114.

Charitable bequest.

"I also bequeath to the poor distressed people of Quorndon, in Leicestershire, the interest of £1000, to be paid half yearly every year but not later," is a good charitable bequest, 184.

Charter-party—See *Freight*, 1.

Company, Public.

A demurrer will not hold to a bill filed by some of the shareholders of a mining company against the directors of the same company, on the ground that the rest of the shareholders are not made parties, 246.

See *Parties.*

Conditions of Sale—See *Vendor and Purchaser.*

Consignee.

A continuing consignee has no lien on the *corpus* of the estate for the balance of his accounts, 142.

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Corporation Act.

Query in whom is vested the legal estates of charity lands under the 71st section of the corporation act.

Query also as to whether the Lord Chancellor has power to appoint new trustees under that section, 248.

Costs.

Parties having agreed that a question as to the right to the proceeds of bills of exchange, which might have been tried at law, should be tried and decided upon a motion for an injunction, but no specific agreement having been made as to costs, and the defendant, after a judgment having been given against them by the Vice Chancellor, which was appealed against to the Lord Chancellor, who affirmed the judgment with costs, held that the costs upon the original judgment and the appeal should be given to the plaintiffs, 255.

See *Creditors—Orders, general—Lunatic Mortgagee.*

Copyholds.

Customs of Manors, 46.

Creditors.

1. A trader dying indebted by specialty and simple contract having devised and bequeathed freeholds and leaseholds to his heir, who he appoints executor, and the heir settles those estates on his marriage, the creditors cannot follow

either the freeholds or leaseholds, but the devisee is personally liable for the value of the estates.

2. Where the testator charges his estates with the payment of certain legacies, and the estates are settled subject to the legacies, the creditors cannot claim those legacies in discharge of their debts.

3. Where a bill by creditors has been dismissed by consent, without reserving a right to appear in a suit for the administration of the testator's assets, and a petition is presented for leave to appear and no order is made on it, they will not be allowed their costs of appearing in the suit, nor will they have any right to appeal, 209.

4. Where there is a trust to pay the income of stock to a father for the better enabling him to support the children, his creditors are not entitled to the same under a general assignment to creditors, 4.

5. A trader died indebted by specialty and simple contract having devised his estates to his heirs, and the devisee having settled those estates on his marriage, the creditors cannot follow the estates, but the devisee is personally liable for the value of the estates settled, 171.

See *Administration of Assets.*

Counsel, fees of.

Fees of counsel; number of counsel; charge for observations; as to the form of hearing the objections to the master's report on bills of costs, 168.

Covenants, mutual.

When mutual covenants contained in marriage articles are ambiguous and contradictory, the Court will put such a construction on the whole of the articles so as to meet the intention of the parties; and though one party fails in performing his covenant, it will enforce the performance of the covenant by the other party, 187.

Covenant, voluntary.

A voluntary covenant by a testator to secure an annuity is binding against his devisee, 101.

Crown—See *Distribution.*

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De bene esse.

A demurrer will hold to a bill to perpetuate the testimony of witnesses, or to examine them *de bene esse*, if parties, alleged to be interested in the question at law, but not on the record at law, are made defendants to the bill. *Semble*, that if there has been a verdict at law, and a rule *nisi* obtained, but no fresh action commenced, it is also a good ground of demurrer, 234.

Decree, Foreign—See *Supplemental Bill.*

Decree, Imperfect.

Where, at the time a decree is taken, a party is dead, it cannot be remedied by a bill of revivor against his representatives, 25.

Decree, Prosecuting Claims after,

and distribution of the fund, 56.

N. B.—It appears that what the Master of the Rolls is reported to have here said, is not to be considered as his judgment, but that he subsequently delivered his judgment, but nearly to the same effect.

Decree—See *Infant.*

Deeds, Bill for.

A devisee of a reversion cannot file a bill for deeds without first establishing his right at law, which is to be done by ejectment and admission of possession by the adverse party, 218.

Demurrer—See *Answer*, 1.—*Discovery*, 1.—*Bill of Revivor.*—*Bankrupt.*—*Averment.*—*Freight.*

Description in a Will.

As to the description of a person, 11.

See *Revocation of a Will.*

Devisee—See *Creditors.*

Devise under a mistaken Notion.

Where a testatrix recites in her codicil that a person, to whom she has by her will given an estate for life, remainder to his issue, was dead, without issue; and then proceeds to devise the estate to another, and it appeared that the devisee had died, but had left issue.—*Query.* Do the issue take? 218.

Diligence, Due.

Where a person advances money to a husband on the deposit of a bond, the subject of the settlement of the personalty, and only looks at the settlement of the realty, which alone was shown to him, and which does not refer to the other settlement; and without making inquiries of the obligor, who was a trustee of the settlement of the realty: —*Held*, not to have used due diligence, 133.

Direction to pay Debts in a Will.

Trustees and executors (though they be different persons), if they join together, may sell an advowson under a general direction by a testator that his debts should be paid, even though the advowson was devised to the trustees for special purposes, 150.

Discovery.

1. A demurrer will not hold to a bill filed by four partners for a discovery, and to stay proceedings at law, on the ground that three of them only were defendants at law, 2.
2. It ought clearly to appear whether a bill is for discovery or for relief, 9.

Distribution.

Where a person who is illegitimate, dies intestate, leaving a widow and no issue, half of his personal property goes to the widow, and the other half to the crown, 139.

See *Decree, Claims after.*

Domicile.

1. Where the Prerogative Courts in this country admit a will to probate, it may be construed according to the laws of this country, as opposed to the laws of the country in which the testator died domiciled.—*Query*, 264.
2. Where a party dies intestate, his property is to be administered according to the law of the country in which he died domiciled, 264.

Equitable Mortgagor,

though he does not pay interest, is entitled to six months to redeem, before a sale can take place, 9.

Erasement—See *Revocation of a Will.*

Estate pur autre vie—See *Husband and Wife.*

Evidence.

If a document is referred to in an answer, a court of equity will not compel a part of the answer to be read in evidence at a trial at common law, 51.

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Exceptions to an Answer.

Exceptions taken to an answer for insufficiency, and the Master allows some of them, but disallows others:—*Held*, not to be a sufficient ground to warrant an application to the court to have all of them taken off the file, 258.

Exceptions to the Master's Report.

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See *Infants.*

Executor.

Where an executor advances money to a legatee on the secu-

rity of his legacy, and does not inform his co-executors; and there is a subsequent mortgagee of such legacy, who gives notice to one of the executors; which executor informed his co-executors, the second mortgage will have the priority, 214.

Exchequer Bills—See *Parties.*

Evidence, Parol.

As to admitting parol evidence in contradiction to a will, 218.

See *Statute of Frauds.*

Family.

Construction of the word in a will, 19, 54, 61.

Feme Covert.

1. The personal representatives of a *feme covert* need not be made plaintiffs in a bill of revivor, if her husband is a party, 23.

This case, by mistake, is entitled, *Metcalfe* v. *Metcalfe*, instead of *Wilson* v. *Ness.*

2. Having an estate to her separate use for life, with a power of appointment after her death, may, by assignment and appointment pass the property to her husband, 35.

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Foreclosure, Bill of.

Where there are two mortgages, and the second mortgagee brings a bill to foreclose, he must offer to redeem the first, 54.

Foreign Judgment.

1. A foreign judgment, if obtained by fraud, may be set aside by the Court of Chancery, 264.

Foreign Will.

1. An objection cannot be taken by the defendant, on the ground that the plaintiff's claim, under letters of administration taken out in this country, to a person who has made a will which has been proved in a foreign country, especially where the objection was not taken at the filing of the original bill, 264.

2. Where a bill has been filed to set aside a foreign will, and establish an English will, it was held necessary to have the representatives, according to the English law, of the parties beneficially interested, before the court, though the foreign representative had possessed himself of the property abroad, 146.

Forfeiture.

Where a legatee, having a contingent legacy, commits a felony

before the contingency happens, and the term of his imprisonment occurs after the contingency has taken place: this is no forfeiture of the legacy.—*Semble*, 6.

Frauds, Statute of.

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1. The owners of a ship cannot recover against the freighters on the charter-party, unless named in it.
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Goodwill—See *Will, Construction of*, 4.

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Husband and Wife.

1. Under a limitation in a will of personalty, to the separate use of a married woman for life; after her death, to her executors and administrators: her husband, as administrator, entitled, and not her executors, 162.
2. A husband, without taking out administration to his wife, cannot file a bill, in respect of her property, *pur autre vie*, which had been limited to her with others as tenants in common, not mentioning their heirs, 143.
3. The estate of a husband, whose wife was administratrix, is not liable, if the estate of the intestate is sufficient to answer the demand, 190.

Illegal Contract.

Demurrer allowed to a bill filed for the purpose of enforcing a partnership contract, in respect of the Surrey Theatre, which was not duly licensed, 179.

Implication—See *Life Interest. Charge by Implication.*

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Where a reference was made to the Master, to ascertain whether two suits were for the benefit of infants, and the Master's report is objected to, the objection must be made by exceptions, and not on the motion to confirm the report, 4.

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Infant, on coming of age, no longer allowed to show cause against a decree made during his infancy, 92.

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Motion for an injunction dismissed by the Master of the Rolls, the question having been under the consideration of the Vice-Chancellor, 125.

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As to the form of the order giving compound interest, 199.

Interest.

Interest not allowed to tenant for life, under circumstances, 141.

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Insolvent Debtor.

A legacy, assigned by an insolvent debtor for a valuable consideration to his mother, on the same day that he makes his general assignment under the act, is good, provided the legacy is not mentioned in the schedule to the general assignment, 223.

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The question, whether a person died intestate or not, must be decided by the law of the country in which he died, 264.

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What descendants entitled to a bequest under the word "issue;" and as to the period of vesting, 165.

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Notice to an appointee of a judgment against an appointor, whose estate is limited to uses to bar dower, does not prevent the appointee from taking the estate free from the judgment, 127.

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Construction of the words of a will, as to whether legacies lapsed, or the executors or administrators of the legatees took by substitution, 164.

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A bequest of leaseholds to executors in trust to sell, will not authorize them to lease, 147.

Lease, Mining, construction of, 32.

Lease—See *Agreement.*

Legacies, accumulative, 109.

Legacy duty.

A testator having died domiciled in India, and appointed by his will executors in India and in England, and his executor in India having collected his assets there, and paid his debts and remitted the surplus to the English executors, for payment of legacies given by his will to legatees in England, held that such legacies were not subject to legacy duty, although the will was proved in this country, and a suit instituted here in respect of such legacies, 252.

Legacy — See *Ademption — Creditors*, 2 — *Executor — Forfeiture — Stamp.*

Legacies refunding.

Where assets fall short a legatee will have to refund if the executor had been sued by *distringas*, but the legatee will be entitled to an inquiry as to the assets, 222.

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Lessor's title.

Where the lessee has notice that he is not to expect the production of the original lessor's title, and he proceeds with the agreement, notwithstanding it is a waiver of his right to the production, 147.

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Life interest, by implication in a will, 54.

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Maintenance.

1. By-gone rents of a deceased tenant in common in tail cannot be decreed to be applied for the expenses of her maintenance, without bringing her personal representative before the Court, 10.
2. Construction of a will, out of what fund maintenance should be raised, 30.
3. Under the words of a decree "all just allowances," in which it was referred to the master to take an account of the personal estate of the testator, he cannot allow for the expense of maintenance, 36.

Maintenance and Advancement.

Legacy to infants paid to their parents for their advancement in the world, and for past and future maintenance, 217.

Manor—See *Copyholds.*

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Like fraud relieved against in equity, and the same rules as to the statute of limitations apply, 11.

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A solicitor employed by two mortgagees fixes the second mortgagee with notice of the first mortgage, 38.

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Mortgaogr.

A bill by praying a sale must offer to redeem, 48.

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A Mortgagor will not be allowed his costs of appearing before the master, under the 1 W. 4, c. 60, where there is to be a reconveyance of an estate which had been mortgaged to a lunatic mortgagee, 50.

Mortgagee in Trust for Sale,

is a trustee, and cannot purchase the mortgaged estate, 48.

Multifariousness.

An information and bill filed for the general administration of two charities, and also impeaching a transaction by which part of the charity lands were exchanged; a demurrer by one of the defendants who had taken the charity lands in exchange was allowed on the ground of Multifariousness, 231.

Multifariousness—Demurrer for, 158.

Notice.

A person having improperly obtained possession of a trust fund, the subject of a marriage settlement in which she had a life-interest and afterwards assigned her life-interest in other property, the subject of the same settlement, and of another settlement, bearing even date; such assignee (having had notice of such abstraction) was restrained from receiving the rents, &c., and a receiver appointed before answer put in, 135.

Notice—See *Executor, Freight, Vendor, and Purchaser.*

Orders General.

1. The Court will, under special circumstance, such as the illness of a master, dispense with the strict observance of the general orders of the Court, and enlarge the time for referring an answer for insufficiency, 195.
2. *Construction*, of 17th and 18th, 272.
31st, 87.
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3. Where the replication is filed on the same day that the plea is put in the paper, the plaintiff shall pay the taxed costs, 43.
4. The order of reference obtained within the six days under the 5th order, must also be served within that time, 58.
5. See *Publication, Enlarging.*

Parties.
1. A general demurrer for want of equity is the proper way of taking the opinion of the Court as to whether persons are improperly made parties, 143.
2. If, after a suit has been instituted, in which legatees have been made parties, and they are afterwards no longer necessary parties, the bill will be dismissed as against them, 25.
3. Demurrer to a bill for not making a company parties. Construction of the 1 & 2 W. IV. c. 24, for lending Exchequer bills to public companies, 95.
4. Persons who have property adjoining, and who dispute the boundary, need not be made parties, 231.
5. A demurrer will not hold on the ground that the representatives of a deceased defendant are not made parties where there is no representation taken out, and the plaintiffs pray to be allowed to take out administration, 246.
6. A defendant may object, because certain trustees (who are directed by a will to pay debts,) were not made parties, though he says, by his answer, that he is the only party entitled, 194.

See *Administration of a Testator's Estate—Amendment—Supplemental Bill—Maintenance*, 1.

Parol Evidence.
Parol evidence not admitted to contradict the written intention of a Testatrix, (expressed in her will,) as to which deed she intended to confirm, 85.

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Query, as to the grantor's right to redeem? Query also whether the grantee is bound to keep up the insurance on the plaintiff's life, where there is a covenant to the effect that the grantee shall assign the policy to the grantor on the annuity being repurchased, 236.

Poor Law Act—See *Trespass.*

Power.

1. Power to appoint new trustees—whether the words to appoint any other person authorizes the appointment of more than one? 106.
2. Exclusive appointments in favour of children as to two separate sums and two separate powers of appointment in a settlement, where the trusts were nearly the same, 107.
3. A person having a power of appointment amongst his children, exercises the power in favour of a child who was on her death-bed, held to be bad, 1.

See *Feme Covert*, 2—*Attetation.*

Power, Execution of, 19.

Power of Sale in a Mortgage.

A Mortgagor cannot on motion obtain an injunction to prevent the completion of a sale made by a mortgagee, under an absolute power of sale, on the ground that a part of the property was not mentioned in the particulars of sale, but only stated by the auctioneer at the time of the sale, the mortgagee having waived his right to object by sending an agent to bid at the sale, who did not at the time protest against the sale on the ground of the omission. The auctioneer may also refuse to receive the biddings of the mortgagor, 232.

Pre-emption, Right of.

Where a testator gives a person a right of pre-emption of an estate, and says he shall complete the purchase within a given time, the purchase-money must be paid, and the conveyance executed; otherwise he will lose his right of pre-emption, 212.

Prisoner in Contempt.

Application *ex parte* under 1 W. IV. c. 36. s. 15. to appoint a person to convey the property of a prisoner in contempt, good, 113.

Publication, Enlarging.

On the grounds of solicitor's illness, and great distress of

mind, which prevented his attending to business, in complying with the exigency of the 17th order, 40.

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Registration, 20.

Rehearing, Refused, after a decree of the Lord Chancellor on appeal, 102.

Relations, nearest.

A testator after giving vested and contingent legacies added, "and if any legacies should die before they can prosecute their claim, their legatees to be divided amongst the nearest relations and next of kin," held that the former words meant die before they are entitled to receive payment, and that the latter words meant next of kin of the legatees, and not of the testator, 226.

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Revocation of a Will.

A testator having contracted for the conveyance of an estate to himself, his heirs, appointees, and assigns, recited the contract in his will, and then devised the estate to trustees in trust to sell; afterwards, he took a conveyance of the legal estate to himself, and a trustee to the ordinary uses to bar dower; held to be a revocation of the will, and that the trustees could not compel a purchaser to accept the title, 243.

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An erasement of a name in a will is not a revocation of the bequest, provided a sufficient description remains, 93.

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Sir Samuel Romilly's Act, 52 G. 3. c. 101, only applies to presenting petitions in respect of simple cases for regulating

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Security, general and specific.

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Separate Use.

Trustee for the separate use of a married woman restricted to the first marriage only, 116.

Scinctilla Juris.

The making a trustee, having only a *scinctilla juris*, a plaintiff is not a sufficient ground for demurrer, 143.

Solicitor and Client.

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3. A demurrer will not hold on the ground that the representatives of a deceased defendant are not made parties where there is no representation taken out, and the plaintiff prays to be allowed to take out administration; nor on the ground that an amended supplemental bill contained allegation of matter which had occurred since the filing of the original bill, together with allegations of facts which had occurred before the filing of the original bill, but which were charged to have come to the knowledge of the plaintiffs after the filing of the original bill. *Semble*, that a demurrer will not hold to a supplemental bill, on the ground of an objection which existed at the filing of the original bill, 246.

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As to the stamp on the mortgage of a legacy, 214.

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Taxation—See *Solicitor and Client.*

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Query as to whether a trustee who had employed the general residue in trade ought to be allowed, in discharge for what he actually paid to the tenant for life, and as to what income the tenant for life was entitled to when the testator gave no direction as to investing the residue? To decide that question the representatives of the tenant for life must be before the Court, 199.

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Trader—See *Trustee.*

Trustee.

Where a trustee mixes the trust fund, which was a general residue, with his own monies in his banker's hands, and employs the mixed fund in trade, the Court will presume that the advances were made out of the trust fund; and where the trustee employs the trust funds in trade, the cestui que trust have the option of either having the profits of the

trade, or compound interest at the rate of £5 per cent., on the monies so employed, with annual rents, 199.

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1. A testator devises to trustees in trust to apply the rents and profits in payment of mortgage debts, their estate ceases on payment of the debts, 7.
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TO THE BINDER.

There are two sheets lettered K, which should be placed according to the paging, which is correct.

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NOTICE.

AT the suggestion of several gentlemen, an alteration has been made in the plan of this Publication which it is believed will add considerably to its utility. The object will be to supply by a monthly number, during the Sittings, an *early* report of such decisions in the several Courts of Equity, as possess matter of interest to the practitioner in Conveyancing and Equity. All extraneous matter will be carefully excluded from the reports; the facts and arguments of counsel will be reduced to as concise a summary as shall appear consistent with accuracy of statement; but considerable space will be devoted to the Judgments. It is submitted to the profession, that this system of reporting, which in fact is on the model of the celebrated Reports of Peere Williams, must if prepared with fidelity, (and on this head the candid judgment of the profession must determine) possess many advantages. It is not attempted to interfere with the regular reports. It is unnecessary to pass any encomium upon the talents and labours of the gentlemen by whom they are prepared. The present work adopts a more humble, but it is believed, not less useful task,—that of supplying with great rapidity and brevity, but with equal accuracy such a report as may supply the earliest information, of important decisions,—Thus combining the two advantages of the ephemeral press, and the permanent Reports—expedition and accuracy.

It has been thought by several gentlemen who have been consulted, that it would be advantageous to the profession, and consistent with the nature of this Publication; to furnish practical comments and suggestions relating to such of the decisions reported, as involve any point of leading importance to the practitioner.

Mr. D. has, therefore, obtained the assistance of a friend, whose experience as a conveyancer will, he has the fullest confidence, insure an able and judicious conduct of this portion of the work. Each number will contain a Supplement devoted to articles of this nature. The extent of the Supplement will vary according to the importance of the subjects requiring comment, and to the space allowed by the reports. A separate paging will be adopted with a view, to the Reports and the Supplements being separated by the binder on the completion of a volume.

MINUTES OF CASES,

ARGUED AND DETERMINED

IN THE

Several Courts of Equity.

LORD CHANCELLOR'S COURT.—November 15, 1837.

Skeeles *v* Shearley.

A judgment creditor, whose judgment is prior in date to that of a mortgagee—which mortgage had been made in exercise of a power created by an indenture made antecedent to the date of the judgment—will be postponed to the mortgagee, even though the mortgagee had notice of the judgment; and the circumstance of part of the mortgage-money having been retained by the mortgagee, for the purpose of paying the judgment debt, in case the mortgagee should become liable for the same, will not make such mortgagee a trustee for the creditor.

The judgment creditor not allowed to redeem, because he filed his bill before the period when the mortgage was redeemable.

In 1824, William Cook was seized in fee simple of certain freehold estates at Bull's Cross, Enfield.

In May, 1824, Cordelia Skeeles, since deceased, lent to William Cook the sum of 1000*l.*, for which he gave a bond, dated the 10th May, 1824, whereby he, together with Thomas Skeeles Wright and James Bacon, became jointly and severally bound to Cordelia Skeeles in the penal sum of 2000*l.*, to secure the 1000*l.*, with interest at 5*l.* per cent.—Cordelia Skeeles made her will, appointing the plaintiff, Sophia Ann Skeeles, sole executrix. The testatrix died in March, 1825.

In Easter Term, 1828, the plaintiff brought an action against William Cook, to recover the 1000*l.* and interest, and obtained a verdict for 1230*l.* for principal and interest, and judgment was entered up on the 22nd July, 1828. And in November, 1830, an elegit was sued out on the judgment.

On the 22nd of November, 1830, the Sheriff of Middlesex extended a moiety of the lands at Bull's Cross, but he did not give actual possession thereof; accordingly the plaintiff brought an action of ejectment, which the defendant, William Shearley, defended as mortgagee.—In this action the plaintiff was nonsuited, on the authority of Doe *v.* Jones, 10 B. and C., 459.

By indentures of the 17th and 18th days of December, 1819, the hereditaments at Bull's Cross were conveyed to William Cook, his heirs and assigns, to hold the same to the use of such persons, and for such estates, and in such manner, as the said William Cook, by deed, writing, or will, —to be executed and attested as therein is mentioned—should appoint, and subject thereto, and in default thereof, to the use of the said William Cook and his assigns, for his life, with a limitation to the use of James Bacon during the life of William Cook, in trust for him, William Cook, with remained to the use of William Cook, his heirs and assigns, for ever.

By indentures of release and appointment, by way of mortgage, bearing date the 21st and 22d of June, 1825, William Cook appointed and conveyed certain hereditaments (other than those at Bull's Cross) to, and to the use of John G. Children and John P. Atkins, in fee, upon certain trusts therein mentioned, for securing the sum of 6000*l.*

In July 1830, there remained due on this mortgage, 3500*l.*

By indentures of lease and release, by way of mortgage, dated the 17th and 19th of July, 1830, after reciting the indentures of the 17th and 18th of December, 1819, and the indentures of the 21st and 22nd of June 1825, it was witnessed that, in consideration of 3500*l.* paid to Atkins and Woodcock (in whom the last mortgage was vested by representation), they, at the request of Cook, assign the 3500*l.*, and Cook appoints the hereditaments at Bull's Cross, and other hereditaments, to the use of the defendant Shearley, his heirs and assigns, for ever; and the mortgagees bargained, sold, and released, and William Cook bargained, sold, and confirmed to the defendant Shearley and his heirs, the hereditaments at Bull's Cross (together with other estates comprised in the other mortgage), to hold the same unto, and to the use of, the defendant Shearly, his heirs and assigns, for ever; subject to a proviso for redemption on payment of 4500*l.* and interest, with a power of sale in default.

The defendant Shearley had notice of the judgment.

It appears that when the bill was filed, the time for redeeming Shearley's mortgage had not then arrived; but neither of the defendants, by their answers, stated that the mortgage of the 17th and 10th days of July, 1830, was not then redeemable, or that the time for redemption had not arrived at the time when the bill was filed.

When the mortgage of July 1830 was paid off, William Cook borrowed the additional sum of 1000*l.* upon having the estate at Bull's Cross included in the mortgage; and it was understood that the 1000*l.* was to be retained for the purpose of being applied in payment of the judgment debt

due to the plaintiff, in case William Shearley should become liable for the same.

The bill was filed in Hilary Term 1833, and the prayer of the bill was, that the plaintiff, by virtue of the judgment, had a lien or charge on the estates prior to any incumbrance of the defendant, and that he might be decreed to deliver possession of the lands extended under the elegit, and that he might be restrained from setting up any legal estate, with a prayer in the alternative to redeem.

One of the points in this case, decided by the Vice-Chancellor, is reported in 1st series of Minutes of Cases, p. 127.—Mr. Wigram and Mr. Stuart appeared for the plaintiff; and Mr. Knight Bruce, and Mr. Lovat, for the defendants.

The Lord Chancellor.—In this case the plaintiff is a judgment creditor of William Cook, the mortgagor, and as such claims to be the first incumbrancer on the estate in question; and if not the first, then he claims to be the second incumbrancer, and as such to be allowed to redeem the mortgage of the defendant Shearley. The plaintiff's judgment is dated the 22nd of July, 1828; upon this judgment he sued out an elegit, and brought an ejectment, and put the sheriff in possession. The title of William Cook to the estate in question, is under a conveyance dated the 17th and 18th of December, 1818, by which the property was conveyed to him and his heirs, in such manner as he should, by deed or will, direct or appoint; and in default of such direction or appointment, a limitation is made to a trustee during the life of William Cook, with the ultimate limitation to William Cook in fee.—This power was executed by deeds of the 17th and 19th of July, 1830, by which Cook appointed the estate to the defendant William Shearley, in fee simple, subject to redemption on payment of 4500*l.*; part of this mortgage-money was to be applied in payment of 1000*l.* due to the plaintiff in the event of Shearley's becoming liable to pay the same. There were two points made by the bill; the first was, whether the plaintiff's judgment was a lien on the property prior to Shearley's mortgage? And the second point was, whether, as part of the mortgage sum of 4500*l.* was to have been applied in payment of the sum of 1000*l.*, the defendant might not be declared to be a trustee thereof, for the benefit of the plaintiff? In both points I concur with his Honour the Vice-Chancellor, and am of opinion that the plaintiff has no such title as he contended for. It was not disputed that the question on the first point was decided at law, and that the estate limited under the power, took effect from the date of the deed creating it, in the same manner as if the conveyance had been made by the deed creating the power.—And that the case of Doe *v.* Jones, 10, B. and C. 459, was an authority for this proposition, but it was said that though it might be so in law, it was not so in equity; because, even supposing that the defendant was not bound by the notice, still, being a specialty creditor of a prior date to the mortgage, he would be preferred to such mortgage, even though it was made in execution of a power.—That that rule does

not apply to a purchaser for valuable consideration, was decided in George *v.* Milbanke, 9 Ves. 190, which is a case directly in point. The plaintiff is merely a judgment creditor, and has no lien by contract. The plaintiff having no lien, the alleged notice is immaterial, for it assumes that he had a lien. It is stated that there was a species of trust for the benefit of the plaintiff as to 1000*l.*; but there is no ground for that, as the defendant could not have been a trustee for the plaintiff, who was not a party to the mortgage transaction, in which the 4500*l.* was paid by Shearley, out of which the 1000*l.* was set apart; and besides that, the 1000*l.* was to be applied only in case Shearley should become liable to pay that sum. It is not material that a reference is made, in Shearley's mortgage, to the former mortgage made by William Cook.—The plaintiff, though he has failed in establishing his points, still he is a judgment creditor; and as such would have been entitled to redeem, had not his bill been filed before the period for redemption had arrived. Every part of the plaintiff's case fails, and I entirely concur in the judgment of his Honour the Vice-Chancellor, as also with regard to the costs, to which must now be added the costs of this appeal.

MALCOLM *v.* O'CALLAGHAN.

A Receiver appointed for the purpose of suing a debtor to a Testator's estate, is not justified in going abroad for that purpose, unless under a special order of the Court.

The Lord Chancellor delivered his judgment in this case, the facts of which were shortly as follows:—It appeared from various orders made in this cause, that a Mr. Wyatt was appointed receiver under the recommendation of five residuary legatees for the purpose of suing a person of the name of Daniel Parker, who was indebted to the estate of the testator under whose will the five residuary legatees claimed. Mr. Wyatt made nine journies to France for that purpose, but without success. And on a reference to the Master, one guinea per diem was allowed to Mr. Wyatt for the expenses incurred in five of these journies, but nothing for the remaining four journies. The receiver took exceptions to the Master's report, and it was referred back to the Master to review his report. The question was, as to whether the Master was justified in the report which he had made. The Lord Chancellor, after having gone through the various orders in the cause, observed, that they did not justify the receiver in going abroad. The question therefore was, whether the ordinary duties of a receiver would warrant his incurring expenses by journies to a foreign country. On this subject there could be no doubt; the practice of the Court would certainly not authorize a receiver to do so without a special order. A country solicitor cannot claim expenses for attending a suit in London. If the proceedings abroad had been successful, it would have been inequitable in the parties concerned to refuse paying the expenses of the receiver. In re Montgomery, 1 Moll. 419, it was decided, that even where a receiver has

acted through ignorance, he must bear the consequences and the loss. His Lordship after stating some special grounds against the receiver's claims, came to the conclusion that the Master was right, and that the receiver's petition ought to be dismissed with costs.

Nov. 16, 1837.

POWYS *v.* MANSFIELD.

A devised to trustees leasehold estates and stock in the funds, in trust to raise 10,000*l. to be held in trust for his neice for life, and after her decease in trust for any husband who might survive her for life, and after the decease of the survivor of them, in trust for all the children of his neice who should be then living; the neice married about three months after the date of the will, and the testator by a settlement made in contemplation of the marriage, charged a reversion in fee, to which he was entitled, with the payment (after the death of the survivor of himself and his brother, without leaving issue male who should attain twenty one) of the interest of* 10,000*l. to the husband for life, and after his decease, to the neice for life, and after the decease of the survivor, with the payment of* 10,000*l. to trustees, in trust for the younger children of the marriage. The testator, by a codicil made a year afterwards, disposed of a portion of his property not before mentioned. The testator died a bachelor.*

HELD *that the provision made by the settlement was a satisfaction of the provision made by the will.*

A person may be held to stand in *loco parentis* to a child, though the father be living, and though the child resides with, and is maintained by the father according to his means. This case confirms the case of Wharton *v.* Lord Durham which decides, that for the purpose of ademption, the sums given need not be of the same character or upon exactly similar trusts.

A codicil cannot be said to make the will speak from the date of the codicil for the purpose of setting up a revoked or an adeemed legacy.

The Lord Chancellor.—I need not state the facts of this case they having already been fully stated in 6 Sim. 528, but it will be necessary for me to deliver my opinion on the points arising in the case, not so much on account of the value of the property in dispute, which is large, but on account of the questions which arise, not being clearly laid down, and the authorities on the subject not being consistent. I cannot concur in the decision of the Vice Chancellor, I have carefully examined the grounds of the decree and have been unusually anxious to consider the authorities applicable to the points in question, in order to satisfy my own mind that I am justified in reversing his Honour's decree, he considered it as settled, and indeed it is not disputed, that if Miss Julia Barrington the wife of the plaintiff, had been a daughter, instead of a neice of Sir John Barrington, the provision made for her by the will would have been adeemed by the settlement made in 1817. The Vice Chancellor himself entertained no doubt on the subject. I apprehend it would also be equally clear if Sir John Barrington

had placed himself in *loco parentis*. It will therefore be necessary to consider what conduct of his would impose that character upon him. In exp. Pye 18 Ves. 154. Lord Eldon embodied all the cases upon the subject; he says in that case, "that a stranger giving a legacy, is understood as giving a bounty, not as paying a debt: he must therefore be proved to mean it as a portion, or provision, either upon the face of the will, or, if it may be, and it seems that it may, by evidence applying directly to the gift proposed by the will, and recollecting how artificial the rules are where a person has educated a child through life, considering himself as standing in the relation of putative father to that child, having a father acknowledged, describing that child as the child of a mother named, and a father named, and also making a provision for that father and mother, it would be too much upon such a will to say, this is the case of a person meaning to pay, not what the Court calls a debt of nature, but a debt he meant to contract; in other words meaning to put himself in *loco parentis*, in the situation of the person described as the lawful father of that child." I perfectly agree with these observations, but this distinction may be considered as inapplicable to the present case. Sir William Grant has defined it to be an assumption of the parental character, or discharging the duties of a parent towards a child. The Vice Chancellor in giving judgment in the present case, said "I cannot find any instance in which a person has been held to stand in the situation of parent to a child, which child had a father living and resided with, and was maintained by its father. I can easily understand that a child may have a father living, but may be as effectually deserted by him as if he had been dead. But there is, I believe, no case in which it has been held that a person stood in the situation of parent to a child, which child was living with, and was maintained by its father according to his means." I am however of opinion that all these circumstances are not necessary. The relation both of parent and child, and a person placing himself in *loco parentis* are both founded on the presumed intention. The father is supposed to intend to provide for his children. The same inference may be drawn from the facts of a person's acting in that character, which is not inconsistent with the fact of a child having a father living who is not in a situation to maintain it. It will therefore be necessary to consider whether Sir John Barrington had subjected himself to a moral obligation of providing for the children, and whether the children can be considered as having been maintained by their father? In the present case a rich uncle takes his brother's family under his protection, and makes a provision for their education and advancement, the father being incapable of doing so, in a manner suitable to their situation in life. Surely the uncle may be considered to have placed himself in *loco parentis*. He will have all the feelings of a parent,—it is immaterial whether the bills for the education or clothing of the children were discharged by the father's own hand or not, or whether they resided beneath the paternal roof, or that of the uncle, provided the expenses of their maintenance are discharged by

him. There is ample evidence to show that Sir John Barrington furnished his brother with the means of bringing up the children, and that they were wholly maintained by him, and not by their father. The fact of a party placing himself in *loco parentis*, creates an equity which would not otherwise arise. His lordship having gone through the evidence, came to the conclusion that it supported the proposition of Sir John Barrington having shown an intention of placing himself in *loco parentis*. And his lordship observed, that where the relation of parent and child subsisted, the gift would be considered as a portion, and that the law leant against double portions; the consequence would be that Miss Julia Barrington could only be entitled to one sum of 10,000*l*. It was contended, that the trusts of the will, and those of the settlement, were different, and that consequently there was no ademption. But the case, in the House of Lords, of Lord Durham *v.* Wharton, 10 Bligh, 401, decided that that circumstance does not at all affect the question. That case was argued in the House of Lords when I had the honour of having a seat there, but I declined giving any judgment upon it, because I had been counsel in the cause, but I fully concur in that decision. It was also argued, that the codicil made on the 23rd of June, 1818, after the settlement made in June, 1817, was a republication of the will, and brought the will down to the date of the codicil. It is very true that in some cases the codicil has that effect, but it cannot be said to be so for the purpose of setting up a revoked or an adeemed legacy; and if in all cases the will was to be considered as speaking from the date of the codicil, the usual clause, revoking all former testamentary dispositions, would have the effect of revoking all intermediate codicils, and thereby undoing every act of the testator. The cases of Mathews *v.* Mathews, 2 Ves. 635—Monck *v.* Monck, 1 Ball and B. 298—Pattison *v.* Pattison, 1 M. and K. 12—Roome *v.* Roome, 3 Atk. 181, are applicable to this point. On the whole, therefore, I am of opinion, that Sir John Barrington did place himself in *loco parentis* towards his neice; the presumption therefore arises, that the legacy was adeemed, and the presumption that a double portion was intended, is not supported by the evidence. I think, therefore, that Sir John Barrington intended her to have only one sum of 10,000*l*.: the result is, that so much of the Vice-Chancellor's decree as gives Miss Julia Barrington two sums of 10,000*l*., must be reversed; and it must be decreed, that the sum given by the will is adeemed by the settlement.

VICE-CHANCELLOR'S COURT.—Nov. 13, 1837.

Heslop *v.* Metcalf.

A Solicitor in a cause who discharges himself, will be ordered (though his bills of costs in the suit and in an action are unpaid) to deliver up the papers to the appointed solicitor of the party, the latter undertaking to hold them subject to the former solicitor's lien.

A refusal to proceed without an advance of money, amounts to a discharge by the solicitor.

The solicitor having commenced an action for costs, no order made as to the taxation.

This was a petition by the plaintiff for the purpose of compelling Mr. Blunt, a solicitor, to deliver up certain papers in his possession.

It appeared that Mr. Blunt had been the solicitor of Mr. Heslop the plaintiff, in certain proceedings at law, and also in the present suit; and that in the course of the proceedings in the suit, viz., in the month of February, 1835, he wrote to the plaintiff calling upon him to make advances in respect of the suit, and to pay the costs of the action. In the month of March following, he delivered his bill of costs, and in May he sent another letter stating that he should proceed no further in the cause, unless the demands contained in his letter of February, 1835, were complied with, and that in case of non-compliance, he, Heslop, must take the consequences. Mr. Blunt afterwards arrested the plaintiff for the costs of both proceedings, and an action was pending in respect of them. Mr. Heslop subsequently employed a Mr. Green as his solicitor in the suit, and called upon Mr. Blunt to deliver over the papers in the suit to Mr. Green. Mr. Blunt refused to do so, but said that they might take copies, it was, however, insisted that the original papers should be delivered up. The letters which were written by Mr. Heslop to Mr. Blunt were of a violent description.

Mr. Knight Bruce, for the petitioner, contended that Mr. Blunt had discharged himself, and that the petitioner was entitled to the same order as that which was made in Colegrave *v.* Manley, Turn. and Russ. 400. Mr. Blunt's letter in February demanded payment of an undelivered bill. A solicitor has no right to say, I will not go on with a cause unless I have money advanced to me. This Court will not deal with general costs, but only those which relate to proceedings in this Court, consequently, Mr. Blunt had no right to make the payment of the costs of the action, a condition for his continuing to carry on the proceedings in equity.

Mr. Jacob and Mr. Addis for Mr. Blunt, contended that there was an agreement between the parties that funds should be advanced by Mr. Heslop for the purpose of carrying on the suit, and that Mr. Blunt had previously stated that he could not undertake the suit on any other conditions. Mr. Blunt did not discharge himself, but was obliged to give up the conduct

of the proceedings by reason of Mr. Heslop's refusal to make the necessary advances.

The Vice Chancellor in giving judgment, said—The first question is, whether, under the circumstances of the case, I am at liberty to make such an order as that which was made by Lord Eldon, in Colegrave *v.* Manley, except as to the taxation of costs?

The next question is, whether Mr. Blunt ought to pay the costs of the petition? It appears to me that Lord Eldon in Colegrave *v.* Manley, made the order on the ground that the solicitor discharged himself. I have looked into the affidavits in this case, in order to see if the circumstances of the case will enable me to say whether Mr. Blunt has discharged himself; I cannot make out, from the terms of the affidavits, that such was the case, but there are two letters written by Mr. Blunt, one in February 1835, and another in May. The last of these states that which the affidavit does not disclose:—In that letter Mr. Blunt threatens that unless his former letter was complied with, he would not go on in the management of the cause. In that letter, Mr. Blunt demanded too much when he required that the whole bill of costs which was incurred, not only in the suit, but in the action, should be paid; the two proceedings ought to have been kept separate. It appears that Mr. Blunt applied in February to request payment of the balance of the bill delivered, which included the costs of the action at law, and it was five weeks after writing the letter, that he delivered the bill of costs; nothing further was done till May, when he sends an intimation that he had received a letter from Mr. Gatty, his clerk, in court, in which he asks if the rules are to be entered, as there is only a day left to enter them, subjoining thereto his intimation, that he would not proceed with the cause, unless his demands made in February were complied with. It appears to me that Mr. Blunt did discharge himself; he did not enter the rules, but they were entered by some other person for the plaintiff; it is a case brought within the principle laid down by Lord Eldon in Colegrave *v.* Manley. It is necessary that there should be not merely an inspection and copies taken, but there must be a delivery of the documents. It appears to me, therefore, that I am bound, by what Lord Eldon said in the case of Colegrave *v.* Manley, to make the order for the production of the papers. As to the taxation, I might have made an order upon the petition, but the parties are already litigating that question in a court of law; it is not therefore my intention to make that order which was proposed to be made as to the taxation of costs in Colegrave *v.* Manley. The only question is, whether the conduct of Mr. Blunt was such as would justify me in giving the costs of the petition? It appears to me that he has discharged himself by insisting upon that which he was not justified in demanding—he had no right to make a condition that there should be a payment of costs incurred in the action, or that there should be a payment of costs which were incurred in February; the bill not being delivered till March. It appears to me that though there was something unpleasant in the manner of Mr. Heslop to Mr.

Blunt, there was nothing amounting to a discharge, or any thing which would make it incumbent on Mr. Blunt to discharge himself; he must therefore be subject to the consequence of having done so. The order must be as prayed, with an undertaking that the papers be held subject to Mr. Blunt's lien. *Order*, that the papers in the suit be delivered up to the present solicitor of the plaintiff, he undertaking to hold them subject to the former solicitor's lien.

DEC. 22, 1837.

HESLOP *v.* METCALF.

The Vice Chancellor's order in this case affirmed.

Notwithstanding, part of the order made by the Court below is altered by the Court of Appeal; the appellant will not be entitled to his costs, if such defect in the order was not one of the grounds of appeal.

The undertaking of a solicitor to redeliver papers to the solicitor from whom they had been received, is also the undertaking of the client.

This was an appeal from the decision of his Honour, the Vice Chancellor, reported at page 8. Mr. Jacob and Mr. Addis for the appellants, cited Ross *v.* Laughton, 1 V. and B. 349, and Lord *v.* Wormleighton, Jac. 580; and they contended that Lord Eldon came to a different conclusion, in the latter case, to that which he came to in Ross *v.* Laughton: they also cited Moir *v.* Mudie, 1 Sim. and S. 282, Twort *v.* Dayrell, 13 Ves. 196, Clutton *v.* Pardon, Turn. and Russ. 301 and 304; and said, that there was no case, except Colegrave *v.* Manley, in which, under the circumstances of the case, papers were ordered to be delivered over; but there was a distinction between that and the present, for in the former case the client offered to pay the costs, but here the client refused to do so. They also observed upon Commerell *v.* Poynton, 1 Swan, 1.

His Lordship, without calling on the other side to answer, confirmed the decision of his Honour, holding that the solicitor discharged himself, and his Lordship declared his approbation of the opinions expressed by Lord Eldon in Twort *v.* Dayrell, 13 Ves. 196, and in Cresswell *v.* Byron, 14 Ves. 271, and said that the order made by Lord Eldon in Colegrave *v.* Manley, Turn. and Russ. 400, was the proper order to be made in this case. Two other points were raised by Mr. Jacob, one of which was that the undertaking of the solicitor in Colegrave *v.* Manley, was not a sufficient undertaking. His Lordship observed that the solicitor was to have every security which the nature of the case would admit of, and which was not prejudicial to the proceedings in the cause; that it was the undertaking as well of the client as of the solicitor. His Lordship also observed that in the case of Colegrave *v.* Manley, the words of the order were, "and all such deeds, &c., belonging to the plaintiff, and which relate to this cause;" but that in this case the words were "and all such deeds, &c., necessary and

material to this cause;" he thought it better to adopt the exact words used in Colegrave *v.* Manley.

Mr. Jacob thereupon observed, that as his Honour's order had been altered, that Mr. Blunt ought to have his costs.

The Lord Chancellor said the rule was, that if on appeal the order of the Court below was altered, and such defect in the order was not one of the grounds of appeal, or was not a question raised below, that such alteration might be made without entitling the appellant to his costs, and he thought that a very salutary rule.

VICE-CHANCELLOR'S COURT.—DECEMBER 5, 1837.

NEATE *v.* THE DUKE OF MARLBOROUGH.

In order to induce the court to lend its aid in enforcing judgments in respect of freeholds, it must be shown that a writ of elegit *has been sued out; and in respect of goods and chattels, that a writ of* fieri facias *has been sued out and lodged with the sheriff of the county in which such goods and chattels are situate.*

This was a general demurrer, for want of equity, to a bill filed by a judgment creditor, for the purpose of obtaining payment of a debt of 8000*l.* due to him from the present Duke of Marlborough, to secure which the Duke had given a *cognovit*, on which judgment had been entered up, and a writ of *fieri facias* sued out. The bill prayed to the effect that the plaintiff might stand in the place of the duke, and be considered *cestuique trust*, under a deed of August, 1818. The Duchess of Marlborough was entitled, under the will of the late duke, to an annuity of 30,000*l.* a-year, charged on the late duke's estates. The present duke, by an indenture dated August, 1818, conveyed all his estates, consisting of freeholds, copyholds, leaseholds, and canal shares, some of which he took under the will of the late duke, and some of which were not included in it, to General St. John, in trust, to secure to the duchess an annuity of 16,000*l.* in lieu of the annuity of 30,000*l.* charged on the estates comprised in the will, and subject thereto, upon trust, to pay the present duke's debts.—By a deed executed shortly afterwards, it was declared that if, in any year, the whole of the 16,000*l.* should not be received by the duchess, then that so much thereof, not exceeding 3000*l.* a-year, should be paid to the duke; and the bill charged that the duke had been in the habit of receiving the 3000*l.* a-year.—The judgment was entered up in November, 1818, and the plaintiff sued out a writ of *fieri facias*, which was lodged with the sheriff of Oxford, for the purpose of levying on the effects at Blenheim. The leaseholds in question were situated in Caermarthenshire.

Mr. Jacob and Mr. Richards for the Duke of Marlborough, and Mr. Knight Bruce and Mr. Wray for General St. John, said, that this was not a bill by a judgment creditor, as an incumbrancer on the estate, seeking to redeem, or to remove an outstanding term or other impediment which prevented his suing out execution, but it sought to make General St. John a trustee for the plaintiff, which was an extraordinary mode of proceeding; that the plaintiff could not obtain relief in this court, unless he had proceeded on his judgment to the utmost extent which the law permitted, and that without success. They did not show by their bill, that there was any personal property which could be effected by the writ of *fieri facias* which they had taken out.—Angell *v.* Draper, 1 Ver., 399; Shirley *v.* Watts, 3 Atk., 200.

Mr. Temple and Mr. Ellison, for the plaintiff, said, that the bill stated that a writ of *fieri facias* had been sued out, which effected personal estates generally; that the bill stated that these writs were executed.

The Vice-Chancellor.—It does not therefore infer that the writ was lodged with the sheriff of Caermarthenshire.

Argument resumed.—The cases of Dillon *v.* Plaskett, 2 Bli. N. S. 239, and Lewis *v.* Lord Zouch, 2 Sim. 389, decide that one writ of *elegit* was sufficient, although the rent was payable out of lands in three counties.

The Vice Chancellor.—In this case it appears to me, that the bill, as it is stated, does not entitle the plaintiff to relief, because it is meant to be represented, that the Duke of Marlborough is, under a deed of August 1818, entitled to an annuity which was derivable from the rents and profits of freehold, copyhold, leasehold estates, and canal shares. But it does not appear that the bill states the fact of there being a direct trust for the duke, but it states in effect that whether the duke shall receive anything or nothing from the trustees, must depend on the duchess. His Honour, after having made some observations on the clauses in the settlement, said,—Now it appears to me, that if the amount to be received by the duke under the trusts did not depend on the amount of the rents and profits, but upon the will of the duchess, that no relief could be given. It appears to me, that in the whole of the allegations of the bill, a case has not been brought forward in which a Court of Equity can relieve. Lord Lyndhurst did not mean, in the case of Dillon *v.* Plaskett to interfere with the settled law, acted on from the time of Vernon down to Lord Redesdale, where he says, "in any case, to procure relief in equity, the creditor must show by his bill that he has proceeded at law to the extent necessary to give him a complete title, thus in the cases alluded to, of an *elegit* and *fieri facias*, he must show that he has sued out the writs, the execution of which is avoided, or the defendant may demur;" then it refers to cases in Atkins and in Vernon's Reports, and some more cases in Atkins, and it appears that it is settled to be law, and has been decided by Lord Hardwicke, who refused to interfere where a party had first sued out a *fieri facias* in a case where an *elegit* was necessary. The creditor must come into this Court, having first established his right at

law, but for some impediment in his way, he cannot take the land in execution; now it appears that it is not stated in terms by the bill that any writs were taken out except the writs of *fieri facias*, which the bill stated were taken out from time to time for the purpose of levying the goods and effects at Blenheim; not a word is said about taking out a writ, which would affect the freeholds, copyholds, leaseholds, and canal shares. Something more ought to have been stated in the bill as to the leaseholds, it does not state that any part of them were situate in the county of Oxford. It appears to me on the face of the bill, that this writ of *fieri facias* was ineffectual, and insufficient for the purposes required. I am of opinion that the demurrer ought to be allowed with costs. But as the plaintiff states a case of a judgment debt, and that he does not know the trusts of the deed of 1818, he must therefore have leave to amend his bill.

DEC. 15, 1837.

METFORD *v.* PETERS.

Where one party in a cause examines a witness before the hearing, and afterwards the cause is referred to the Master, the other party may examine him in proof of exhibits, without an order of the court for that purpose.

The question in this case was this—a Mr. Nicholas, the solicitor of the defendant, was examined on his behalf before the hearing of the cause; a reference was afterwards made to the Master, to ascertain whether a sum of 1000*l.* was paid in respect of a legacy, or was a voluntary gift. In order to ascertain this, it was necessary to produce before the Master, letters which had been written by Mrs. Nicholas, and for the purpose of proving these letters, the plaintiffs called Mr. Nicholas himself. The question was, whether the plaintiffs could examine the witness, who had been examined before the hearing of the cause, without an order of the court?

There was another question, whether the defendant had waived his objection; but as it was not necessary to decide it, owing to the first question having been decided against the defendant, we shall not mention the circumstances involving that question.

Mr. Wigram and Mr. Bethell, for the defendants, contended that the general rule was, that no witness who had been examined before the hearing of the cause, could afterwards be examined in the Master's office, as it tended to make the witness swerve from the testimony which he had previously given; and they cited Vaughan *v.* Lloyd, 1 Cox, 312, and Rowley *v.* Adams, 1 M. and K., 543. Mr. Knight Bruce and Mr. Hayter, for the plaintiffs, said that the rule on this subject was laid down by Lord Eldon, in Smith *v.* Graham, 2 Swan, 264. That in the case of Birch *v.* Walker, 2 Scho. and Lef. 518, it was decided, that if a witness had been merely

examined as a witness to a deed or some such matter, the interrogatories need not be settled by the Master, as it was evident that then he was not to be examined to the same matter; and that if the rule was not in favour of the plaintiffs, then that there had been a waiver on the part of the defendants.

The Vice-Chancellor.—"I have a strong impression in my mind, that the rule only extends to prevent the person examined on one side of the cause, from being examined on the same side before the Master, without a special order; that was the reasoning of Sir John Leach, in Rowley v. Adams—for he said, 'The rule is well settled, that a witness who had been examined in the cause, cannot be examined again before the Master without an order, and such order is in general accompanied with a direction, that he shall not be examined upon any points with respect to which he has been previously examined in the cause; for it would be too dangerous to truth and justice to afford to such a witness an opportunity of mending his testimony, when he had found, by the evidence on the other side, where the weakness of the case lay.' That is a reason to show, that the Master of the Rolls thought the rule to be as I do, not referring to a case where one side called a witness and examined him on behalf of himself, and afterwards, during the proceedings, the other side examined that witness; in this case the witness is not examined twice by the same party, but is a witness adverse to the party who calls him; if that party chooses to call such a witness after the hearing, he may do so, but he takes his own risk. It appears to me, I must confess, that, from the form of the interrogatories, he must have known what sort of witness he had to deal with."

In the course of the argument, the Vice-Chancellor asked Mr. Wigram whether he could produce any instance of such an application as the present, where a witness had been examined, before the hearing, for the plaintiff, and afterwards examined before the Master, by the defendants.

Mr. Wigram admitted that he knew of no such case.

DEC. 12, 1837.

IN RE PADDINGTON CHARITIES.

The Statute of 59 Geo. III. cap. 12, sec. 17 (which vests parish lands in churchwardens and overseers of parishes, as a corporation) does not apply to cases where lands are held by trustees upon special trusts for a parish, but only applies where the trusts are declared generally in favour of the parish.

This section does not apply to copyholds, because a corporation cannot be admitted to copyholds.

Vice-Chancellor.—The property in this case consists of freehold and copyhold lands; the freeholds were vested in trustees, in trust, to apply the

rents and profits in the purchase of bread and cheese, to be distributed, by the churchwardens and overseers of the parish of Paddington, amongst the poor of that parish; the other part of the charity lands consists of copyholds, vested in the same trustees by the grant made by the Bishop of London, of the manor of Paddington, in 1717, whereby the lands were granted to certain persons and their heirs, for the use and benefit of the person or persons who, from time to time, should be trustees of the freehold lands, and upon the same trusts: to these copyholds the trustees were from time to time admitted; the master found these facts and declared who should be trustees, and approved of a scheme.

Mr. Rudall appeared for the petitioners, and argued that what the master had done, was all wrong, because under the 59th Geo. III. c. 12, sec. 17, the lands were clearly vested in the churchwardens and overseers of the parish. The language of the 17th section of the 59th, Geo. III. c. 12, is this; "that all buildings, lands and hereditaments, which shall be purchased, hired, or taken on lease by the churchwardens and overseers of the poor of any parish, by the authority, and for any of the purposes of this act, shall be conveyed, demised, and assured to the churchwardens and overseers of the poor of every such parish respectively, or their successors, in trust for the parish; and such churchwardens and overseers of the poor, and their successors, shall and may, and they are hereby empowered to accept, take, and hold, in the nature of a body corporate, for and on behalf of the parish, all such buildings, lands, and hereditaments, *and also all other buildings, lands and hereditaments belonging to such parish;* and in all actions, suits, &c. &c."

It was said upon the authority of Doe *v.* Hiley, 10 Bar. and Cress. 885, that the lands in question were vested in the churchwardens and overseers of the corporation, and that in exp. Annesley 2 Y & C 350, which refers to two other cases, one of which is reported in Adolphus and Ellis, is also an authority on this subject; I have looked into all those cases and am still of the same opinion, which I entertained in the Attorney General *v.* Lewin, which came before me in April last. In that case exceptions were taken to the masters' report, in which a reference had been made to the master to appoint trustees for a charity estate consisting of copyholds, and to approve of a new scheme, the master refused to interfere to appoint trustees, because he considered that the act took the land out of the trustees; but he approved of a scheme. The report was excepted to on the ground that he ought to have appointed trustees; in that case I decided that the copyholds were not included in the act; and I thought it very extraordinary if copyholds could be vested by the act, in the churchwardens and overseers, as a corporation. It appears also to me that the statute never meant to apply to a case where there were special trusts; I can easily understand that where lands were given generally for the parish, that the act would apply, because there the land might fairly come within the meaning of the words, "and also all other buildings, lands, and hereditaments belonging to such parish." The case in the Court of King's Bench which I referred to, does not enter on the

subject to any extent; this question was not entertained. It, therefore, appears to me, that it cannot apply to the present question, in which there is a special trust, which may, or may not be for the benefit of a parish. As to the other points which was before me, in the Attorney-General *v* Lewin, whether the statute applied to copyholds, I do not think it can, because it cannot be said that copyholds belong to a parish, or that it was the intention of the legislature to vest copyholds in the churchwardens and overseers, as a corporation, and thereby take the whole interest in lands out of lords of manors, and convert such lands into irrecoverable freeholds. Having looked into the cases, it appears to me that they are all resolvable into this; that the case decided at law do not apply to a special trust, or where the lands are copyholds; therefore, the case is left as it was before the statute. It appears to me to be unaffected by this statute; in the first place, here the copyholds are given not for the parish generally, but in trust, to purchase bread and cheese, to be distributed by the churchwardens and overseers amongst the poor. It therefore appears to me that the order which directed that the master should appoint new trustees, and approve of a scheme, is an order which ought to have been made. His honour observed, in answer to a question put to him by Mr. Wakefield, that the only report which he had seen of the case of the Attorney-General *v.* Lewin, was in the note to exp. Annesley, 2 Y and C. 352, where it is called Attorney-General *v* ———.

ROLLS' COURT.—NOVEMBER 14, 1837.

MATSON *v.* SWIFT.

Where a will is proved by an executrix alone, who is one out of three persons appointed executrix and executors, she being of an advanced age, not applying the assets in due course of administration, and being otherwise incapable of administering the estate properly, the court will interfere to appoint a receiver.

John Smith, late of the Isle of Sheppy, by his will, dated the 1st of August, 1836, appointed his wife, Sarah, and his friends, Thomas Ansaldo Hewson, and William Murton, (three of the defendants) executrix and executors and trustees of his will, and thereby devised and bequeathed his residuary real and personal estate unto his three trustees, upon trust, to convert the same into money, and thereout to pay his debts, funeral and testamentary expences, and pecuniary legacies, and invest the surplus money in the public funds or real securities, and thereout to pay certain annuities therein mentioned, and pay over the residue of the dividends &c. of the

SUPPLEMENT.

Of the effect of the Execution of a Power in defeating Judgments.

SKEELES *v.* SHEARLEY.

This case was argued before the Vice-Chancellor, and decided by him, on the 23rd of July, 1836, and is reported in the first series of this work, Vol. 1, p. 127, as to the material point, viz.: that a judgment creditor whose judgment is prior in date to that of a mortgage which had been made in exercise of a power created by an indenture antecedent to the date of the judgment, will be postponed to the mortgage, even *though the mortgagee had notice of the judgment.* This decision has been confirmed by the Lord Chancellor, whose judgment is reported in the preceding pages of this publication.

It will be found of the greatest practical importance, for it is probable that few instances occur in the sale of estates of inheritance in which advantage may not, either wholly or in a great part, be taken of the principle now clearly settled by the present case.

It is well known that one important duty of the solicitor of a purchaser in the investigation of the vendor's title, and the neglect of which duty will render him liable to an action for damages, consists in making a search for judgments docketed against the vendor, and against those under whom he claims.

The period during which this search is made to extend is, *in practice*, usually confined to the last ownership, and then only for a period of ten years, unless some intermediate judgment should be found, in which case the search is carried back to a further period of ten years from such discovery. But, it is scarcely necessary to observe, this rule of practice ought not to be implicitly followed, particularly in those instances (and which often occur in manufacturing districts, and other increasing places) where, within a very few years, there may have been a numerous succession of ownerships. In all such cases the search for judgments ought to extend to the whole series of owners, so as to show a period of at least ten years prior to the purchase in which no judgment can be found docketed against *any one* of the owners who may have been seized within that time; for as judgments attach upon a seizin subsequently acquired, it is not sufficient to limit the search against the several owners to the period of their respective ownerships. In some instances, where there is ground for suspicion, or from other causes, it becomes necessary to make a still more extensive and rigorous search.

an opinion, that when a conveyance is made to A. and his heirs, to such uses as he shall appoint, and in default of appointment to him in fee, the power of appointment is void, inasmuch as A. is in by the common law, there being, he conceived, no difference between such a limitation, and a conveyance unto and to the use of A. and his heirs, with a power of revocation reserved thereupon, in which latter instance the power is unquestionably void. Sir Edward Sugden, on the other hand, in his book on Powers, contends, that under the limitation given in the first example, A. must be considered to take under the statute, in order to give effect, according to the intention of the parties, to the uses limited in the shape of a power; and in the recent editions of his work, he has cited a case which establishes this doctrine. Moreton *v.* Lees, 1 Sugd. Pow. p. 169, 6th ed.

If this case be admitted as an authority, it is decisive that an appointment will be equally efficacious in overreaching judgments, whether made upon the purchaser's own seizin, or upon that of a trustee. Our own opinion coincides with that expressed by Sir Edward Sugden; and we think, therefore, that Moreton *v.* Lees cannot now be shaken: but we are aware that some eminent conveyancers, for whose judgment we have the highest esteem, dispute the authority of that case, and it is evident that the report of it in Sir Edward Sugden's work, did not induce Mr. Sanders to alter his opinion; for, in the last edition of his treatise on uses, he repeats the arguments he had used in the preceding editions, and he makes no allusion to the case. Mr. Preston also *arguendo* in Ray *v.* Pung, 5 Mad. 318., expresses, in very strong terms, his disapproval of the case, so far as it determined the validity of the power, although it was an authority in support of the point for which he was contending, viz. the effect of an execution of the power in barring dower.

With these opinions against the validity of a power limited upon the seizin of the donee, we think that until Moreton *v.* Lees shall have been confirmed by another decision, it will be prudent to convey the seizin to a trustee, and in that case the covenants must be entered into with him, for the purpose of making them run with the land.

It may be proper to remind the practitioner, that many instances will occur in which it will not be necessary to resort to the creation or the exercise of a power, for the purpose of barring dower or judgments—viz. where the legal estate, either in fee or for a long term of years, is outstanding, for such estates will themselves be an effectual protection; but in the preparation of conveyances, it will be more in accordance with the general cautious practice of the conveyancer not to rely upon these safeguards.

The following form of limitation may be adopted, with a view, as well to barring dower where the purchaser has married since the 1st January, 1834, as to enabling judgments to be defeated. When brevity is particularly desirable, the words in italics may be omitted.

"To have and to hold, &c. unto the said [trustee] and his heirs, to such "uses *upon such trusts, and to and for such intents and purposes, and with,*

"*under, and subject to such powers, provisoes, agreements, and declarations*, as "the said [purchaser] shall, by any deed or deeds, *with or without power of* "*revocation or new appointment*, to be by him legally executed, or by his "last will and testament, or any codicil or codicils thereto, to be duly exe- "cuted and attested, direct, limit, or appoint; and for default of such direc- "tion, limitation, or appointment, *and so far as every, or any such direc-* "*tion, limitation, or appointment, shall not extend* to the use of the said "[purchaser,] his heirs and assigns for ever. And it is hereby declared "that the widow of the said [purchaser] shall not be entitled to dower out "of, or in the premises, or any part thereof."

It will be observed that in the above form the power is made to extend to an appointment by *will* as well as by *deed*. This is, in fact, merely a revival of a portion of the old form, which has for some years become obsolete, being supposed to possess neither utility or advantage where the other usual limitations were inserted. It may, however, in our opinion, be found useful as affording the same means of protection against judgments to a *devisee*, as it has been shown to possess in favour of purchasers. But it is scarcely necessary to state, that in order to render the power available for these purposes, the will ought to be so expressed, as to show most unequivocally, the testator's intention to execute his power, and this, notwithstanding the 27th. section of the 1 Vict. c. 26, which declares that 'a *gene-* "*ral devise* shall operate as an execution of a power, unless a contrary in- "tention shall appear;" for it is conceived that a general devise, where the testator had an estate for it to act upon, will unquestionably be deemed sufficient evidence of an intention that the devise should take effect in respect of the interest, and not of the power. The inconvenience alluded to by Mr. Butler, in his note to Fearne's Cont. Remrs. 347, as resulting from the introduction of a power to appoint by will, viz. the difficulty of ascertaining whether the disposition operates as a devise of the land, or an appointment of the use is not likely to occur in future, as the great cause of contention on this subject is removed by the section above cited.

The only difficulty that might henceforth possibly arise, would be the converse of that hitherto existing: for the question in future will be, whether a general devise passes the estate; whereas it has hitherto been, whether it operates as an execution of the power.

Whether a Corporation can be seised of Copyholds.—Parish Lands.

Re PADDINGTON CHARITIES.

The two points decided by this case are, 1st. that lands held by trustees upon *special* trusts, do not *belong* to the parish, within the meaning of the 17th sec. of the 59th Geo. III. c. 12. 2ndly, that, independently of the nature of the trust, *copyholds* will not vest in the parish within that section.

The decision on the first point, rendered it unnecessary to express an opinion on the second point. But the latter question was expressly before the Vice Chancellor in Attorney General *v.* Lewin, to which his Honour refers in his present judgment, and of which there is a short report in 2 Young and Collier, 352, (n.) under the name of Attorney General *v.* ——

The case of Doe *v.* Hiley, which is cited by the Vice Chancellor and the two very recent cases in 4 Ad. and E. 274 and 478, are exceedingly strong authorities for extending the words of the Act to every description of property, which in a *popular sense*, can be said to belong to the parish. But those cases are certainly distinguishable from the first point in the present case, for in each of them the property had been distinctly treated by the churchwardens and overseers as belonging to them, by their acts of demising and of receiving rent in their official character, and the nature of the original trusts is not shown.

The grounds on which the Vice Chancellor considered copyholds not to be included in the Act, are not very fully stated by him, but it is presumed that a question, which has been agitated as to the capacity of a corporation aggregate to hold copyhold lands must have occurred to his Honour's mind, and it would seem to be his opinion, that a corporation could not be a copyholder, for he considers that the operation of the act in question, if it had the effect of vesting copyholds in the churchwardens and overseers would be to change the tenure of the property, an effect which could not have been in the contemplation of the Act, for the consequence of such a result would be that the parish would take *more* than belonged to it, viz. the rights of the lord.

Mr. Watkins, in his treatise on copyholds, vol. 1. p. 299, thinks it questionable whether an admission of a corporation, either aggregate or sole, could be compelled against the lord for it does not appear how a corporation can be a copyhold or customary tenant, or discharge the services as suit of court &c., and as a corporation is immortal, the fines in consequence of the death, would be lost, neither can it do homage, because it must appear in person, and a corporation aggregate cannot appear in person.

A distinction has been considered by some authors, to exist between a corporation aggregate, and a corporation sole, as some of the objections above cited from Mr. Watkins' work, do not apply to a sole corporation, and if the latter be treated in his individual capacity, the whole of the objections fail. But we conceive no such distinction can, on principle, be permitted, and we incline to the opinion, that in all cases, a surrender to a corporation is void. See Mr. Coventry's note to his edition of Watkins' Copyholds, vol. 1. p. 299.

Of the Ademption of Legacies.—Republication of a Will.

POWYS *v.* MANSFIELD.

A few observations upon the doctrine of ademption of legacies, so far as it involves the questions which arise in the present case, may be generally

useful, and at all events will assist to elucidate the decision of the Lord Chancellor.

The rule of the Court of Equity has been for sometime clearly settled that every legacy given by a *father* to his legitimate *child*, shall be considered as a *portion*, whether the testator's intention to treat it as such be apparent or not; and that the subsequent advancement of a portion on the child's marriage shall be deemed to be a satisfaction of the legacy portion, both being for the same purpose and object: viz., a provision for the child founded upon a moral and natural claim which the child has upon its parent, or as it is called, "a debt of nature." Of the amount necessary to satisfy that claim, the parent is considered at all times to be the sole judge, and therefore when a parent subsequently to his will makes an advancement to his child, he is presumed to have considered it a sufficient and a complete discharge of this "debt of nature," and consequently to have revoked the legacy which, at the time of making his will he thought necessary or sufficient for the same purpose: and as circumstances may at different periods of the parent's life induce him to vary in his opinion as to the amount, which, for the time being, ought to be a sufficient satisfaction of his child's natural claim, he will be deemed to have intended the marriage portion to have been an equally full and complete satisfaction, although much less than that which by his will he showed to be in his judgment then necessary or proper. Sometimes, however, the difference between the characters of the two provisions may be so great as to rebut any inference, arising from the advancement, that the donor intended one gift as a substitute for the other. What shall constitute a sufficient amount of difference to rebut this artificial presumption of the donor's intention has frequently been the subject of discussion, and this is one of the points in the present case, where it will be seen it was held that the difference between the trusts of the two provisions was not so important as to affect the doctrine.

But when the legatee has no natural claim upon the testator, all that he receives either by will or by advancement is supposed to be bestowed upon him wholly as a *bounty;* and without reference to any moral obligation on the part of the giver. Every such gift therefore being without any definite object, is perfectly independent of the other, and must unavoidably, according to plain reason, be treated as *additional* to any previous bounty.

If, however, the testator by his conduct to his legatee, assume the office of a parent, he induces expectations on the part of the child, which renders it morally imperative upon him to realize those expectations, by making such a provision as a parent may naturally be expected to make; and whenever he is considered to have placed himself in this position, the doctrine springing from the presumed duty and discretion of parents is equally applicable to the stranger—in short, that he stands in all respects, *in loco parentis.*

The decision of the Lord Chancellor furnishes a very strong instance of an assumption of parental duties and obligations sufficient to bring the provisions within the rule which we have endeavoured to define, the leading

features of which are, that a stranger may assume the office of parent, *though the natural parent be living, and ostensibly supports the child.*

We cannot dismiss this subject without expressing our regret that a doctrine founded on such artificial assumptions of the testator's intentions should exist. It is probable, that in almost every instance it will be found that the effect resulting from the doctrine, is in fact, the very antipodes of the testator's intention. And the rule appears in a still more ridiculous light when placed in juxtaposition and contrast with the law applicable to advancements by a stranger.

The present case furnishes a suitable illustration. By his Honour, the Vice Chancellor's decision, which treated the testator as a stranger to the legatee, the latter was held to be entitled to the legacy in addition to the marriage portion, but by assuming (as on appeal the Lord Chancellor has done) that the testator was morally bound to make a provision for his niece, half the provision is in fact taken away from her.

The doctrine appears not only absurd and unjust in its consequences, but the reasoning on which it is founded is untenable. There is a great difference between a provision made during the life of the parent, and one to take effect after his death. The first may be, and frequently is, for temporary or partial assistance during the parent's life, and with a view to some further provision at his death, or perhaps at some earlier period. The second is intended to be a final provision. In the more modern authorities, the doctrine has not received much approbation, and in some instances it has been severely condemned. However, it is now too deeply rooted to be shaken.

Another point was incidentally decided by this case—namely, that though a codicil is said to make the will speak as if it were made at the date of the codicil, yet this rule of law must not be adopted so literally as to set up a legacy given by the will, which had become adeemed by a subsequent provision. The effect of a codicil, it is true, is to bring down the date of the will, but it is not to alter the sense of the latter. The will must be construed according to its original import.

An instance occurred in practice, within our knowledge, which may serve to illustrate our view upon the subject. A gentleman, soon after marriage, and prior to the birth of a child, devised his estates to his "first son *hereafter* to be born." Afterwards a son was born, and, after the birth of this son, the testator republished his will, and subsequently had a second son. A doubt was entertained by an eminent conveyancer, whether the will, whose date had, by the republication, been brought down to a period subsequent to the birth of the first son, but prior to the birth of the second son, might not, by the words of the devise, pass the estates to the second son. We never considered that such a doubt was tenable, and we have reason to think that the apprehension expressed by the learned gentleman arose from an anxiety, caused by personal regard for the parties, to suggest every point of difficulty or doubt for the purpose of its being obviated, and not from a conviction of its importance.

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